WESTERN AUSTRALIAN LICENCE CONDITIONS

INDEPENDENT STRATEGIC REVIEW

FINAL REPORT

Prepared for
Department of Environmental Protection
by Welker Environmental Consultancy

February 2003

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EXECUTIVE SUMMARY

BACKGROUND

This independent strategic review (the Review) was commissioned by the Department of Environmental Protection (DEP) to examine conditions in licences issued pursuant to section 57 of the *Environmental Protection Act 1986* (the Act). The approach taken in the Review involved:

- desktop review of Western Australian and interstate (principally New South Wales and Victoria) licensing practices;
- targeted consultation with members of the Stakeholder Reference Group and associated groups and individuals;
- identification and review of key issues;
- stakeholder briefings and review of the draft Review Report; and
- review of stakeholders' submissions on the draft Review Report.

The review has identified a number of issues of interest or concern and made a number of findings and recommendations for improvements to the licensing process. The lack of transparency, policy and administrative frameworks, and certainty in the administration of licensing were major stakeholder concerns.

ISSUES RAISED

Overall there was substantial stakeholder (community and industry) dissatisfaction with the current licensing process and outcomes that has led to a loss of confidence in the process. The Review identified thirteen key issues as requiring attention.

Many of the Review's recommendations relating to stakeholder involvement, administrative procedures and policy context would also be applicable to the works approval process.

1. Role of licences

The role of licences is not well understood and other instruments (such as pollution abatement notices and directions) are available which are potentially more suitable to control or abate pollution. There is lack of appreciation that licences are the last link in the environmental approval "chain" and that environmental acceptability is decided in the environmental impact assessment or works approval processes that precede a licence application.

DEP does not seem to appreciate that community concerns can be legitimately addressed in the condition setting process given the definitions of pollution and unreasonable emissions under the Act.

Licences should be seen as an instrument to provide a consent to emit from premises, ensure ongoing compliance and require improvements in performance in line with changes to prescribed policies and standards, or changes in environmental risk.

Administrative procedures should be prepared for the licensing process including criteria and process for the re-assessment or review of licences initiated by the CEO.

All stakeholders supported concurrent (and integrated) assessment processes for environmental impact assessments, works approvals and licences. The Review proposes that administrative procedures should be prepared to encourage concurrent assessment processes and that draft licence conditions should be available during the impact assessment and works approval processes. The availability of

licence and works approval conditions during the impact assessment process would enable the EPA to provide advice as required and stakeholders to make comment on such advice during the Part IV appeal process.

Integrated or common assessment processes may eventually require amendments to the Act. There may however, be opportunities to have common assessment processes for at least low level environmental impact assessments and works approval and licence applications. Trialling of a common assessment process is proposed.

Some decisions taken under planning legislation that may pre-empt licence decisions are of concern. Administrative procedures between the Western Australian Planning Commission and DEP are required to ensure a co-ordinated approach.

2. Sustainability

Sustainability can provide the necessary intellectual and strategic framework for the licensing process.

Licences can play a limited but important role in the maintenance of sustainable development provided appropriate administrative procedures and policy context are in place. The current policy and procedural framework is grossly inadequate and the administration of the licensing process lacks transparency, clarity and certainty. The improvements that are proposed by the Review to move towards sustainability and address a number of stakeholder concerns include:

- Review sustainability principles proposed in the current amendments to the Act to more comprehensively address sustainability.
- Develop an appropriate policy context for licensing and consider licence and works approval conditions earlier in the environmental approval "chain".
- Adopt a "tripartite" (community, regulator and licensees) agreement processes for the development of policies, guidelines and procedures rather than the traditional "publish and defend" approach.
- Apply an environmental improvement plan (EIP) process to encourage continual improvement by licensees where there is ongoing community concern. The implementation of EIPs would be enforced through a licence condition or environmental agreement.
- Amend the Act to enable and enforce environmental agreements (contractual arrangements) and neighbourhood environmental improvement plans.
- Prepare guidelines for stakeholder involvement in the licensing and works approval processes which encourage direct engagement of stakeholders.
- Public reporting of environmental performance.
- Develop positive incentives for licensees to do better than statutory requirements including licence emission limits.
- Greater use of independent auditing of environmental performance.
- Formalise the current auditor accreditation scheme through amendments to the Act.

3. Stakeholder involvement

Community stakeholders were particularly critical of the current licensing process and saw community involvement as critical to gaining trust in the licensing process. Some stakeholders representing industry felt that a small proportion of the community can have a disproportionate effect on the licence conditions imposed without any improvement in environmental outcomes. This claim is strongly disputed by community stakeholders.

Currently the licensing process lacks transparency and there is considerable uncertainty as to opportunities for community stakeholders to provide input to the process.

Stakeholder concerns are often better addressed in the works approval or impact assessment processes because licensing cannot address issues of acceptability if proposals are implemented in accordance with works approval and approvals under Part IV (Ministerial Statements) of the Act. The lack of early involvement can lead to considerable community stakeholder frustration.

The Review proposes, amongst other things:

- Concurrent assessment of works approvals, licence applications and environmental impact assessment where practicable to enable more effective stakeholder involvement.
- There should be an opportunity for submissions from community stakeholders when the receipt of an application is advertised.
- The locations for inspection of licence applications should be advertised.
- DEP should prepare assessment reports to accompany draft and final licences explaining the reasons and basis for licence conditions.
- A draft licence and DEP assessment report should be available for public comment for a period which would depend on the environmental risk posed by the activity and prior community opportunities for comment on licence conditions.
- Draft licences should be provided to those stakeholders that indicated an interest when an application was advertised.
- DEP should be able to convene conferences between community stakeholders and licence applicants as required.
- Publication of licences and assessment reports on the DEP web site.

4. Scope of conditions

Stakeholders were very critical of conditions applied by DEP for many reasons. These include the requirements of conditions:

- go beyond powers provided by the Act;
- are not prescriptive enough;
- don't reflect sustainability principles;
- are often arbitrary, ad hoc and not within an appropriate policy context; and
- unnecessarily constrain operations without an environmental gain.

Some stakeholders hold views on legal interpretations that conflict with those held by DEP on the extent to which reductions in emissions can be required. This is particularly the case when conditions are based on "reasonable and practicable measures".

The Act should be amended to clarify the scope of licence conditions and emission limits should be set on a clear, transparent and consistent basis.

5. Consistency between approvals under Part IV and Part V of the Act

The divergence and inconsistencies between conditions or approvals that are imposed through Ministerial Statements and licences are of concern. Inconsistencies create uncertainties as to compliance and may detract from the ability of DEP to enforce licence conditions. Licence conditions

that are more or less stringent than in the corresponding Ministerial Statement may be challengeable in law. There needs to be better coordination between approval processes under both Parts of the Act.

Rationalisation and integration of approval processes, instruments and decision makers under the Act is warranted and should be considered under the next major review of the Act.

The Review also proposes that:

- Inconsistencies should be corrected as licences are renewed or reviewed.
- Administrative procedures be prepared to improve coordination and encourage concurrent administration of approval processes under the Act.

6. Best practice or reasonable and practicable measures

The implementation of best practice licence limits by DEP based on taking all reasonable and practicable measures was of great concern to stakeholders representing licensees as it was seen as arbitrary and often unjustified. This DEP practice relies on a favourable interpretation of the Act to impose such limits.

Community stakeholders are not confident that best practice can be defined and question how such terms are defined and who should define them. There is also little confidence that DEP has the capability to determine best practice or reasonable and practicable measures.

The arbitrary imposition of emission limits based alone on DEPs assessment of what is reasonable and practicable is inappropriate and can lead to less than optimal environmental outcomes and adds considerable uncertainty to the licensing process. However, it is reasonable to require a licence applicant to demonstrate that proposed emissions are consistent with taking reasonable and practicable measures (now a waste minimisation principle under proposed amendments to the Act).

The setting of targets for improved performance (doing better than emission limits in licence conditions) should be through a voluntary EIP process. The EIP may be negotiated between the community, licensee and the regulator.

The EIP process has proven to be successful interstate.

The Review proposes that:

- The Act should be amended to ensure reasonable and practicable measures may be considered in setting licence conditions but the general offence for not taking reasonable and practicable measures should be removed from the Act.
- DEP should encourage the EIP process, particularly in situations where there is ongoing community concern. The process should be applied to determine targets, but such targets should not be emission limits in licence conditions. However, the implementation of an EIP should be a condition of licence to enforce the outcome of the EIP process unless an environmental agreement is place.
- If a licensee refuses to prepare an EIP in these situations, DEP should require an independent audit of environmental performance and implement the results through licence conditions.
- Special consideration should be given in the enforcement policy to those licensees who perform better than that required by conditions of licence. Civil rather than criminal sanctions are more appropriate for breaches of EIPs or environmental agreements.

7. Cumulative impacts and environmental capacity

Currently cumulative impacts, environmental offsets and sharing environmental capacity are difficult to address because of the absence of an adequate policy or environmental agreement framework. In some parts of the State cumulative impacts from very large sources of sulphur dioxide have been addressed through the Environmental Protection Policy process. This process is complex and lengthy and other mechanisms are warranted that are more flexible, suitable for local conditions and stakeholder friendly.

DEP has at times allocated environmental capacity on an arbitrary basis through the setting of lower emission limits in conditions. The reservation of environmental capacity for future development is not an environmental protection but an industrial development issue. Any trades in capacity or sharing of capacity (including those emissions that may be traded) should be within a policy or agreement framework.

Environmental offsets are not readily achieved through the current licensing process but are important in achieving cost effective environmental outcomes. Offsets may be achieved by licensees through environmental agreements between licensees, non prescribed premises, regulator and the community as required.

Neighbourhood environmental plans and environmental agreements are potentially useful mechanisms to address cumulative impacts, environmental offsets and trading of emissions (including the types of emissions that can be traded) involving several premises.

8. Emission limits and ambient standards

Emission limits are outcome based and are the most important component of licences as they make clear the consent being given to the licensee for significant emissions. Operational or maintenance conditions are at best an indication of what is required to control emissions but may be appropriate where emissions cannot be measured.

The Act provides little guidance and DEP has not developed any guidelines on the extent to which emissions should be prescribed in licence conditions. Whether emission limits are imposed is also highly discretionary and the current process for determining emission limits lacks transparency and is inconsistent. A guideline or procedure is required to determine when emissions are prescribed in order to reduce uncertainty and increase confidence in the licensing process.

The Review proposes that the characteristics of all significant emissions that can be measured and are required for the development to proceed should be described in licence conditions. In the first instance, the assessment of significance and demonstration of the acceptability of emissions should be the responsibility of the licence applicant. Whether an emission is significant should be assessed on the basis of inherent and residual environmental risk that takes into account community concern and local environmental circumstances.

Emission limits for significant emissions should not be prescribed in conditions if they cannot be measured. Ambient standards may be prescribed in licence conditions in these situations provided an acceptable monitoring protocol is available and a clear relationship can be demonstrated between the source and measured ambient levels. Ambient standards may be quantitative or qualitative.

Reductions in significant emissions obtained through improvements over time should be surrendered or may be traded within a specified time in accordance with formal policies. Policies that provide a framework for surrendering emissions should be developed.

9. Review and term of licences

The proposed amendments to the Act enable long-term licences to be issued in line with interstate practice. The issue of short-term licences in the past has led to an increased workload and more opportunities for appeals. There is little justification for short-term licences particularly as polluting emissions should not be licensed and proposals have to be implemented in accordance with a Ministerial Statement and/or a works approval to be licensed.

The reduced opportunity for appeal with long-term licences requires the development of a clear policy and administrative procedures for the triggering of CEO initiated reviews. Triggers may include high level of community concern, changes to formal policies and new environmental information.

Some stakeholders were concerned that the CEO may amend a licence without advertising or providing an opportunity for the community or licensee to comment. This Review proposes that the CEO initiated amendment of licence conditions should be subject to the same process as that for a licence application or an application for amendment to licence. If urgent action is required this may be taken by serving a pollution abatement notice or direction.

10. Enforcement

Enforcement policy is the subject of a review by Dr Brian Robertson and was not considered in this Review other than to suggest that the new enforcement policy should not discourage licensees from doing better than statutory or licence limits.

Guidelines should be prepared for the drafting of enforceable conditions, and model conditions should be prepared for comment by stakeholders. The use of discretionary terms such as "reasonable and practicable" should be minimised to improve the enforceability of conditions.

New mechanisms, possibly civil rather than criminal sanctions may be appropriate for situations where licensees have voluntarily committed to targets. Environmental agreements may be an avenue to pursue in this regard.

11. Content of conditions

All stakeholders were critical of inconsistencies in conditions and emission limits applied to different premises. Inconsistency and arbitrary conditions are more likely to arise from a licence requirement to take all "reasonable and practicable measures". Community stakeholders found it hard to rationalise differences in the licence limits imposed and all stakeholders questioned the legal standing of preambles. Throughput conditions may be subject to future legal challenges and should be removed from licence conditions.

12. DEP capability

All stakeholders felt that DEP has neither the resources nor the capability to do the job expected of it. Preliminary comparisons with interstate agencies on a per capita basis showed that:

- The number of licences administered by DEP is likely to be excessive and could be reasonably reduced by almost 50%.
- The expenditure on the pollution management function is about half of the average of NSW and Victoria. This comparison would suggest that this function in WA is substantially under resourced.

The excessive workload created by too many licences, the administration of registered premises and under resourcing of the pollution management function has resulted in poor training of staff and inadequate development of a policy and procedural framework. This in turn has led to inconsistencies and arbitrariness in the administration of licensing. Poorly drafted licences and conditions lead to increased licensee and community dissatisfaction and make auditing and enforcement difficult.

Increased enforcement is of little use if inappropriate, unenforceable or unauditable conditions are imposed.

The workload of DEP should be decreased and resourcing increased if pollution management is to be properly administered.

The implementation of the outcomes of this review will require substantial resources and commitment. Furthermore, Review recommendations for better coordination or integration of approval processes under the Act may require review of organisational structures within DEWCP.

The formation of a specific task force to implement the recommendations of this review and those of the review of enforcement policy should be seriously considered.

13. Environmental risk

The Review proposes the assessment of environmental risk (which takes into account community concern) of an emission should be the primary basis for the prescription of prescribed premises, assessment of significant emissions, incorporation of emission limits in licences and environmental improvements. The level of environmental risk is based on an assessment of the following:

- Scale, timing and characteristics of the environmental hazard (emission).
- Likelihood of the emission including the reliability of controls applied to the emission.
- Consequences of the emission including human and ecological consequences and level of community concern.

Quantitative or qualitative environmental risk assessment provides a rational, clear and transparent process for the assessment of environmental significance of emissions and activities.

ADDITIONAL ISSUES RAISED IN SUBMISSIONS

All submissions generally supported to varying degrees the findings and recommendations presented in the draft Review Report. Many of the recommendations are considered to be a priority for implementation by one stakeholder and another suggested that some aspects relating to sustainability should be developed further over time.

Concerns about "moving goalposts" were raised and are addressed by the recommendations of this Review. Suggestions made by members of the Stakeholder Reference Group on matters to be addressed during the process of setting licence conditions should be considered by DEP in the development of licensing procedures.

RECOMMENDED MODEL LICENCE

The following structure for a model licence is proposed and would substantially simplify, clarify and improve the current licence structure, content and emphasis.

1. Section 1 –Cover page – Description of prescribed premises and activities, and licensee
    - Licensee, premises address, prescribed activities, licence number, date of issue, amendments dates, term.
2. Section 2 – Index to licence
3. Section 3 – Definition of terms used in the licence
4. Section 4 – Emissions and ambient limits schedule
    - Emission limits, ambient limits and location of emission points and ambient monitors for ambient limit (tabulated and shown on map).

5. Section 5 – Environmental management plans and operational controls
   - Operational controls, maintenance requirements and management plans – Only if required.
6. Section 6 – Performance monitoring and reporting
   - Monitoring, auditing, investigations and reporting.
7. Section 7 - Environmental improvement plan (optional)
8. Section 8 – Severance
9. Section 9 – Plan of premises

LIST OF FINDINGS AND RECOMMENDATIONS

The following Table provides a list of the specific findings and recommendations of the Review.

Finding	Recommendation
Role of licences	
F1. There are a number of other instruments available under the Act that are effective in the control of emissions from prescribed premises. Licences should not be considered as the primary instrument for abating pollution that may arise but are a mechanism to ensure ongoing compliance on prescribed premises.	R1. Environmental acceptability of emissions and management controls from prescribed activities should be determined wherever possible during the Part IV and works approval assessment processes rather than in the licensing process.
F2. The roles of licensing and other statutory instruments under the Act are not well understood by the community. The licence is the last "link" in the environmental approval chain for works or proposals and is an effective tool to ensure ongoing compliance of operations in circumstances of substantial environmental risk. Licences can be used to require improvements in performance in line with changes to prescribed standards or policies or new environmental information suggests a substantial change in environmental risk.	R2. Administrative procedures should be developed in consultation with key stakeholders to address the process and circumstances for the re-assessment or review of licences.
F3. The environmental acceptability of a proposal or work is best assessed upfront through environmental impact assessment under Part IV and the assessment of works approval applications rather than the subsequent licence application. This approach adds certainty to the process for the applicant (provided the proposal or works has been completed in accordance with those approvals), and encourages more effective community input to decision-making during early stages of the design and development of the proposal or work.	R3. Wherever practicable, the likely conditions that may apply at the works approval stage should be available during Part IV environmental impact assessment and similarly the licence conditions and information on operational controls and emissions should be available at the works approval stage.
F4. Decisions (subdivision) taken under planning legislation that may pre-empt or pressurise decisions under Part V are of concern to some stakeholders.	R4. The integration and administration of environmental approval processes should be addressed by the next major review of the Act but in the interim Part IV, works approval and licence assessments should be run concurrently wherever practicable.
F5. Availability of information on the controls, emissions and likely licence conditions during the Part IV environmental impact assessment or works approval stage would also reduce the "pressure" on the licensing process and assist in upfront determination of the acceptability of emissions. Integration of environmental approval processes under the Act may be difficult under the existing or proposed amendments to the Act.	R5. Administrative procedures should be developed between the Western Australian Planning Commission and DEP to enable advice on the acceptability or likely conditions that will apply to prescribed works before decisions under planning legislation are made.
F6. The purpose of making available likely licence or works approval conditions during the Part IV process would be to enable the EPA to provide advice on the conditions and for stakeholders to comment on this advice during the Part IV appeal process. All stakeholders providing comment supported concurrent assessments (and integration of approval processes) and the upfront provision of information early in the environmental approvals "chain".	R6. Administrative procedures should be developed to encourage concurrent assessment of proposals under Part IV of the Act and works approval and licence applications.
F7. A licence provides a useful mechanism to give effect to emission trading and environmental offsets determined under an appropriate policy or agreement framework.	R7. Draft works approval and licence conditions should be provided to the EPA and published in the EPA bulletin to enable stakeholder comment during the appeal period on the EPA advice provided on these conditions.
	R8. The role of licensing should be considered carefully during the next major review of the Act but in the interim a licence should be considered as appropriate where there is need for: • an ongoing dialogue between the community, DEP and the licensee on environmental performance; • ongoing compliance and reporting of emissions because of the potential environmental risk posed by an activity; • giving effect to emissions trading and offsets (within an appropriate formal policy context); and • bringing activities into line with new or changes to approved policies and changed environmental circumstances.

Finding	Recommendation
F8. The circumstances and process for the re-assessment of existing licences are unclear. Such re-assessment has led to suggestions of "moving the goalposts" and creating unnecessary uncertainty in the licensing system. There is the potential for licence re-assessments or reviews to create anomalies between approvals under Part IV and Part V. F9. The definition of an unreasonable emission (that is an emission that unreasonably interferes with the health, welfare, convenience, comfort or amenity of any person) under the current Act or proposed amendments to the Act suggests strongly that community issues/concern can be legally taken into account in setting licence conditions to prevent or mitigate pollution. F10. A licence is not the most appropriate instrument (PANs and directions are better alternatives) to bring known polluting (as defined under the Act) activities into line but it may be an effective instrument to facilitate the implementation of changes to formal policies. Industry and community stakeholders seem to be in agreement with the principle that a licence is a consent to emit but not to pollute.	R9. In principle, polluting (as defined under the Act) activities should not be dealt with through licence conditions but preferably through notices or directions even on licensed premises.
Sustainability	
F11. Sustainability can provide the necessary intellectual and strategic framework for the licensing process. A strategic framework has not been established in WA but the draft Sustainability Strategy is the first stage in this process. F12. The current licensing process prescribed under the Act has a limited role in the assessment of sustainability of new proposals or works. However, the capability of the present licensing process to facilitate achievement of sustainable outcomes can be substantially enhanced by the recommendations of this Review for the administration of the process and the creation of appropriate procedures and policy context. F13. The set of principles under the proposed amendments to the Act are incomplete but provide some basis for the implementation of sustainability. F14. The current procedural and policy framework for licensing is grossly inadequate. DEP has enhanced policy development but the process for stakeholder involvement in the preparation of these policies has yet to be articulated. F15. Negotiated "tripartite" environmental agreements may be an alternate option to the development of formal policies under the Act. However, there is currently no head power for such agreements to be prepared and given effect under the Act. F16. The current administration of the licensing process lacks transparency, clarity and certainty because of the lack of a policy framework and systematic licensing procedures and guidelines. F17. The application of EIPs has been a very useful mechanism in Victoria to promote environmental improvement in situations where there is substantial community concern or uncertainty in the assessment of environmental risk. The preparation and implementation of EIPs may be facilitated through the licensing process. There is considerable debate on whether EIPs should be voluntary or required in the first instance through a licence condition. The emphasis of this review is to encourage the voluntary preparation (but enforcement of implementation through licence conditions) of EIPs except where there are changes to prescribed standards, policies or environmental circumstances. F18. Independent auditing or assessment of environmental performance by DEP accredited auditors particularly in situations of intense community interest would enhance community confidence in the licensing process.	R10. The licensing process should have regard for community engagement and the principles under proposed amendments to the Act. R11. In addition to the above, the following should be implemented to facilitate sustainable development: • Development of an appropriate sectoral, activity, environmental or local area policy framework. • Consideration of licensing issues in the broader environmental context as early as possible in the environmental approval "chain". • Development of administrative procedures and policies in consultation with stakeholders to ensure transparency, clarity and certainty in the administration of the licensing and policy process. • Encouragement of direct engagement of the community by the licensee in conjunction with the regulator to seek optimal outcomes for improved environmental performance. • Public reporting of environmental performance (both good and bad) by licensees and the regulators. • Positive incentives for licensees to achieve improved environmental performance on an ongoing basis. • Independent auditing of environmental performance where required. R12. DEP should, in conjunction with stakeholders, develop guidelines for stakeholder involvement in the licensing process and the preparation of policies. R13. The negotiated agreement approach should be used for the development of licensing policies, procedures and guidelines in preference to the traditional "publish and defend" approach. R14. The sustainability principles required, application of sustainability criteria and the role of licences in achieving sustainability should be addressed in the next major review of the Act. R15. Consider further changes to the Act to provide head powers and general procedures for: • Preparation and implementation of negotiated environmental agreements. • Preparation of neighbourhood, catchment or local area environmental improvement plans by approved persons. • Accreditation of independent environmental auditors. • Positive incentives/reward schemes for environmental improvement

Finding	Recommendation
Stakeholder involvement	

F19. There are opportunities for works approval conditions to be made available during the Part IV assessment process and licence conditions to be developed concurrently with the works approval process. Concurrent assessment with Part IV would enable an opportunity for stakeholder comment on other issues of environmental acceptability that cannot be addressed in the licensing and works approval processes. Coordination with the planning approval process may also enable wider issues to be addressed.
F20. Stakeholder concerns are better addressed early in the development of the proposal or work to reduce the pressure on the licence application process. The licence process cannot address issues of environmental acceptability and wider environmental issues of concern. These wider environmental issues are often of primary interest to the community.
F21. The Act does not provide specific guidance on stakeholder consultation and no guidelines are available on effective consultation (DEP are currently addressing this matter). The complexity involved in defining persons with a direct interest is great and will create substantial difficulties of implementation. The process lacks transparency and has led to considerable uncertainty as to the opportunities for community stakeholders and licensees to provide input to the licensing process.
F22. The publication of an assessment report would enhance stakeholder understanding by providing the basis and reasons for the imposition of conditions
	R16. Stakeholder involvement should be encouraged during the works approval process when environmental standards may be determined and the design and environmental performance of a proposed work may be assessed.
	R17. Opportunities for coordinated and concurrent assessment of proposals and works approval and licence applications and conditions should be pursued wherever practicable.
	R18. DEP should prepare and provide assessment reports with draft and final licences to inform stakeholders as to the basis and reasons for deciding emission limits and other conditions.
	R19. Administrative procedures and guidelines for stakeholder consultation during the works approval and licence processes should be prepared and include the following:
	• Timeframes for the decision-making process.
	• Encourage applicants to consult with community stakeholders during the preparation of licence applications.
	• Opportunity for negotiations between the licensee and the DEP on proposed conditions or changes to licences during the preparation of the draft licence.
	• Publish receipt of applications or amendments as follows:
	  • in the local community newspaper as well as the West Australian where appropriate;
	  • include a short description of the subject of the application/amendment;
	  • invite community stakeholders to indicate an interest and provide submissions over a two week period (corresponding to the appeal period for setting level of assessment); and
	  • advise of locations where applications may be viewed.
	• Provide a copy of the draft licence/works approval together with the draft assessment report to the licensee and those community members who indicated an interest in the application.
	• Determine a public review period for draft works approvals or licences the length of which would depend on:
	  • the potential community interest in the application;
	  • the degree of public scrutiny of licence conditions during the Part IV assessment process;
	  • previous community involvement in the setting of licence conditions;
	  • significance of the environmental risk associated with the subject of the application; and
	  • whether the change is the result of a voluntary EIP or environmental agreement.
	• Advice from Health WA on public health standards as required.
	• Option for DEP to convene a conference between community stakeholders, public authorities and the applicant/licensee to resolve issues as required.
	• Conduct of the EIP process.
	• Publication of the licence on the DEP web page upon issue with the final assessment report.

Finding	Recommendation
Scope of licence conditions	
F23. There are major conflicting views on the ability of the current Act (and the proposed amendments to the Act) to apply conditions that impose emission limits based on taking reasonable and practicable measures. F24. Under the current Act uncertainty can be taken into account in setting emission limits or ambient standards in line with the precautionary principle. Environmental risk assessment approach would be the major consideration in the setting of limits and other conditions (refer Section 17).	R20. Consideration should be given to amending the Act to make it clear as to the scope of licence conditions. R21. Emission limits imposed through licence conditions should take into account uncertainty, environmental risk, ambient levels and any approved policy.
Consistency with other approvals	
F25. Licence conditions more or less stringent than those in the corresponding Ministerial Statement may be potentially challengeable in law. F26. There are inconsistencies and divergence between approvals under Part IV and licences and works approvals which cause a lack of clarity and certainty in the environmental outcome and enforcement. F27. There are benefits for both the licensing and the EPA's environmental impact assessment processes if proposed licence (and works approval) conditions are made available to the EPA before it reports to the Minister under Part IV of the Act. Administering the Part IV and Part V processes concurrently will reduce inconsistencies, promote community stakeholder considerations and provide greater certainty and clarity to licensees. The development of common assessment process and approval for low-level assessments under Part IV and works approvals and licences has substantial merit. F28. Likely licence conditions should be considered in the Part IV appeal process if the EPA's advice to the Minister is based on its assessment of these conditions. F29. A rationalisation of approval processes, instruments and decision makers under the Act is warranted and should be considered under the next major review of the Act.	R22. The consistency of licence conditions with Part IV approval and works approvals should be reviewed and corrected as licences are renewed or reviewed. R23. An administrative procedure should be developed for coordination and to encourage concurrent administration of approval processes under Part IV and Part V of the Act. R24. A procedure for a common assessment process and approval for low level assessments under Part IV and works approvals and licences should be considered and trialled on a voluntary basis. R25. Rationalisation of approval processes and decision makers under the Act should be considered as a priority under the next major review of the Act.
Best practice or reasonable and practicable measures	
F30. The primary function of licensing under the Act is to protect the environment and not to develop "technology based limits". Demonstration of the application of the waste minimisation principle proposed under amendments to the Act (taking all reasonable and practicable measures) is a responsibility of proponents/licensees in accordance with their circumstances, community concern and the environmental risk posed by the activity. The process may involve negotiated agreements between the licensee, regulator and the community before or following the issue of a licence. F31. The current DEP practice of insisting on "reasonable and practicable" emission limits through changes to licence conditions is strongly criticised by many licensees and relies on a favourable interpretation of S51 and S62 of the Act. F32. Demonstrating that a new source is consistent with the proposed waste minimisation principle (taking reasonable and practicable measures) in the Part IV or works approval processes is a reasonable expectation and is consistent with modern regulatory practice. F33. However, the arbitrary imposition of emission limits based alone on the regulators assessment of what is "reasonable and practicable" is inappropriate and can lead to less than optimal environmental outcomes. This approach adds uncertainty to the licensing process with a loss of confidence in the process from both community and licensee's perspectives. F34. The setting of ongoing targets for improved performance in situations where there is substantial community concern may require an EIP process involving the regulator, the community and the licensee in which agreed targets for improvement can be developed.	R26. The Act should be amended to ensure that the waste minimisation principle proposed under amendments may be considered by the CEO in the setting of conditions and the general offence for not taking all reasonable and practicable measures (DEP's interpretation of S51) should be removed from the Act. This may be accomplished by the removal of S51. R27. A formal policy/guideline should be prepared, through a negotiated process with stakeholders, on how the waste minimisation principle in the proposed amendments to the Act will be applied in the licensing process. This policy should also address what is considered "reasonable and practicable". R28. "Reasonable and practicable" should not be driven by technology alone but also consider environmental risk and the circumstances of the individual licensee. R29. World's best practice should not be considered to be "reasonable and practicable" unless it can be demonstrated as such. R30. Proponents should demonstrate (as required by EPA) taking all reasonable and practicable measures during the Part IV assessment process. Where a Part IV approval process is not required, the works approval applicant should be required to demonstrate in the works approval application that such measures have been applied. If there is dispute between the works approval applicant and the regulator on the application of the proposed waste minimisation principle, an independent expert should be engaged to provide advice. R31. The ongoing application of the waste minimisation principle following the issue of a licence should be on a voluntary basis through an EIP process.

Finding	Recommendation
F35. The conduct of independent audits and public reporting of environmental performance (including improvements and comparisons with industry benchmarks) where there is a substantial environmental risk at the time a licence is reviewed would add confidence and transparency to the licensing process. F36. The need for an offence for not "taking all reasonable and practicable measures" in the context of proposed amendments to the Act and the difficulties of defining reasonable and practicable is difficult to justify. The waste minimisation principle in proposed amendments to the Act can be given effect through approved policies and consultative/negotiation processes rather than through an offence provision under the Act. F37. The proposed amendments to the Act enable licence conditions requiring the preparation of EMPs and EIPs. F38. The EIP process has proved very successful in Victoria as it emphasises voluntary preparation of EIPs and a tripartite process where agreement is achieved between the community, regulator and licensee. F39. The EIP has a role in: • demonstrating improvement in environmental performance, • comparison to industrial benchmarks; • consistency with environmental principles; • promoting engagement with the community; and • documenting improvement programs to meet new environmental standards. F40. Taking punitive action against those persons for breaching targets that go beyond statutory compliance will discourage progressive commitment to environmental performance. The enforcement of voluntary targets is a critical issue that needs to be resolved.	R32. DEP should in situations where there is substantial community concern encourage the licensee to voluntarily undertake an EIP and amend the licence to ensure the EIP is implemented. Where a licensee refuses to prepare an EIP or produces an unsatisfactory EIP, DEP should require an independent audit of environmental performance and implement the results of the audit through amendment to licence conditions R33. DEP should, in conjunction with relevant stakeholders, review its enforcement policy to ensure that licensees voluntarily taking up the EIP process are not unnecessarily penalised for not meeting targets in the EIP. Civil rather than criminal sanctions are more appropriate for breaches of EIPs or environmental agreements. R34. Targets prepared through the EIP process should not be specified as licence limits in licence conditions. R35. A scaled reward system should be developed by DEP following extensive consultation with stakeholders, which rewards those licensees that go beyond compliance and engage the community (EIP process) and have an appropriate environmental management system in place. R36. DEP should develop guidelines for the preparation of EIPs and community involvement in this process.
Cumulative impacts, offsets and environmental capacity	
F41. In the absence of adequate policy and regulatory framework cumulative emissions, trading and environmental offsets are unlikely to be adequately addressed. The current Act and proposed amendments do not enable the preparation of neighbourhood environmental improvement plans or environmental agreements which would provide workable and more inclusive alternatives to the EPP process. These instruments can also address issues that are difficult if not impossible to address under the current licensing process. F42. DEP has on occasions arbitrarily reserved "environmental capacity" or made allowance for anticipated current ambient levels through setting lower emission limits. To further restrict the use of environmental capacity to preserve opportunities for future development is unreasonable in the absence of formal Government policy. F43. The reservation of environmental capacity for future development is not an environmental protection issue but is primarily an industrial development, commercial or Government economic development policy matter. In specific areas the Government may determine rules for sharing environmental capacity. Any trades or reallocations would require the consent of the regulatory agency to ensure the environment is protected by the transaction. F44. Environmental offsets are not readily achieved through the current licensing process but are important in achieving cost effective environmental outcomes within a local area.	R37. The Act should be amended to include head powers for neighbourhood environmental improvement plans and environmental agreements. These instruments may be applied where cumulative emissions, multiple sources or limited environmental capacity are an issue to provide a framework for: • establishing environmental objectives and an action plan; • community consultation; • addressing cumulative impacts in accordance with environmental objectives; and • offsetting and trading. R38. A formal policy should be developed on sharing of environmental capacity. R39. A formal policy or guideline should be prepared on environmental offsetting in licensing.

Finding	Recommendation
Emission limits and ambient standards	
F45. The representative for the Chamber of Minerals and Energy on the Stakeholder Reference Group maintained in his submission on the draft Review Report that emission limits should be established on the basis of scientific assessment but recognises that in the absence of specific knowledge it may be appropriate to set limits through a tripartite arrangement between regulator, industry and the community. Similarly the Chamber of Commerce and Industry indicated that community concerns should be scientifically based. Those stakeholders who provided specific comment on this issue indicated that targets should not be prescribed as emission limits in licence conditions. Emission limits are outcome based and the most important component of a licence as they are clear as to the consent for emissions being given to the licensee. The imposition of operational or maintenance conditions are at best an indication of meeting environmental outcomes. The imposition of outcome based conditions is consistent with the recommendations of the Keating Review. F46. The Act does not provide any direct guidance on the extent to which emissions from prescribed activities may be specified by licence conditions. The intent of the Act appears not to require specification of emissions except that required by the CEO to administer the licence. Consequently, the extent of emission specification is highly discretionary and a transparent and clear process is required to determine which emission limits are placed in licence conditions. F47. The Act provides a defence to licensees for pollution and taking reasonable and practicable measures offences. Licence conditions can be used to specify emission limits for all significant emissions under the current Act and more clearly under proposed amendments. F48. The concepts that apply to the allocation of water may be applied to the use of the environment for receipt of emissions. Only that part of the environmental resource required to support the development may be allocated. Similarly it may be argued that only those significant emissions required for the development should be specified in a licence. F49. Significance of emissions will vary from place to place depending on a number of factors including the environmental risk (including community input) posed by the emission and local ambient levels of contaminants. The definition of pollution and unreasonable emission suggest that community concerns can be taken into account when determining licence limits. F50. Emission limits are not an emissions inventory but an inventory may be required by licence and subsequently lead to review of emission limits set by conditions. F51. DEP favours the setting of emission targets not as emission limits but as a trigger for a management response. A licence condition would specify the response required. F52. The EIP process can be employed to determine targets (refer Section 12).	R40. Emission limits for significant emissions should be the principle focus of licence conditions as they are outcome based and define what is permitted to be emitted (the emission consent being provided) in a transparent and clear manner. R41. Significance of emissions should be determined on the basis of inherent and residual environmental risk of emissions which includes consideration of community concern. R42. Emission limits should not be imposed on diffuse or fugitive sources where it is impracticable to measure the emissions or an appropriate monitoring protocol is not available (as this severely limits enforcement). The application of a condition that restricts the impact or sets an ambient level would be more appropriate in these situations provided a clear relationship can be drawn between the source and ambient levels measured. R43. The following approach should be followed for specification of emission limits for significant emissions in licence conditions: • The onus should be on applicants to identify, in licence applications all significant emissions that are likely to arise from prescribed activities on the premises. • The applicant should demonstrate in the licence/works approval application that the level of environmental risk is acceptable, the waste minimisation principle (taking all reasonable and practicable measures) has been adequately addressed, any community concerns have been identified and addressed and the emissions are consistent with any approved policy. • Emission limits for significant emissions should be determined on the basis of acceptable environmental risk (determined as appropriate through a tripartite process), emissions required for the development and cumulative impacts. • An emission limit schedule should be constructed for a licence and this schedule should define the characteristics (including location) of all significant emissions. Emission limits for fugitive or diffuse sources should not be included in the licence where they can not be accurately measured. • The emission limit schedule should not be considered an emissions inventory. R44. Reductions in licensed emissions obtained through improvements over time should be surrendered or traded (if not required for future expansion) within a specified time in accordance with an approved policy. R45. Targets should be developed through the EIP process and should not be specified in licence conditions (refer Section 12).
Review and term of licences	
F53. Under the current Act licences have been issued on a short-term basis principally because of the inability to charge an annual fee for a long-term licence. The proposed amendments to the Act apparently remove this problem. F54. The annual renewal of licences has led to an increased workload for DEP and more opportunities for appeals. F55. There is little justification for short-term licences where the licensee is complying with works approval and Part IV conditions. The CEO has the power to amend the licence at any time. This loss of appeal opportunity is of concern to some community stakeholders.	R46. Licences should not be issued for a short-term unless the life of the development is limited given the CEO power to amend the licence pursuant to S59A and S60 3(a). R47. Any amendments to the licence proposed by the CEO should be subject to the same advertising and consultation requirements as applications for amendment to a licence by licensees. R48. Licences should be subject to review in response to a high level of community concern, changed receiving environment, new environmental information or policy circumstances.

Finding	Recommendation
	R49. DEP should prepare a detailed administrative procedure for the review of licence and CEO initiated amendments to licences in consultation with stakeholders.
Enforcement	
F56. Guidelines are required for drafting of legally enforceable conditions. F57. The approach to the enforcement of targets based on doing better than emission limits will influence the extent to which licensees will commit to environmental improvements. New legislative mechanisms (agreements) may be required to encourage licensees to innovate.	R50. DEP should prepare guidelines for the drafting of legally enforceable conditions and prepare model conditions for comment by stakeholders. R51. The enforcement policy should not discourage licensees to do better than statutory limits. R52. Environmental agreements should be considered as an alternate mechanism for implementation of voluntary targets and environmental improvements.
Content of conditions	
F58. All stakeholders complain about consistency in emission limits and conditions applied in licences. The types of inconsistencies vary widely. Inconsistent and arbitrary conditions are more likely to arise from the imposition of the requirement to "take all reasonable and practicable measures". F59. Preamble and contextual statements in licences create confusion amongst all stakeholders as to their enforceability. Throughput conditions at best reflect in gross terms emissions from the premises and may be legally challengeable under the existing Act. F60. Ambient standards have a lesser role in licences than the setting of emission limits except where an emission limit cannot be specified for a significant emission and a clear relationship can be established between the source and measured ambient levels. F61. Recommendations in Section 14 should substantially address issues of inconsistency and arbitrary imposition or determination of emission limits.	R53. Throughput should not be inserted into licence conditions but may be used to describe the scale of the prescribed activity. R54. Ambient standards should only be placed in licence conditions for significant emissions for which emission limits cannot be accurately specified or measured and a clear relationship can be established between the source and measured ambient levels. R55. Ambient monitoring should only be required for: • an ambient limit specified in a licence condition; or • a special program of investigation is required to determine environmental risk; or • cumulative emissions of concern; or • situations where environmental capacity is limited or exceeded; or • a formal emission trading or offsetting scheme is in place.
DEP capability	
F62. The current resources available to effectively administer the licensing system and develop a policy and procedural framework are inadequate. F63. The development of an appropriate policy and procedural framework will enable more consistent decisions to be made by officers. F64. A comprehensive training program to enhance the capability of DEP officers has yet to be developed. The current capability of DEP officers is not held in high regard by many stakeholders. F65. The move to long term or perpetual licences will reduce the licensing workload. F66. The implementation of the outcomes of this review will require substantial resources and commitment and potentially some restructuring within DEWCP.	R56. The current prescribed premises schedule should be reviewed to reduce the number of prescribed premise to those that pose substantial ongoing environmental risk and determine where other mechanisms under the Act should be used to protect the environment. R57. The resourcing of DEP should be reviewed to ensure adequate resources are available to manage the pollution management function. R58. Reduce the number of registered premises or consider delegation of registered premises to local government authorities. R59. A comprehensive training program should be developed for DEP officers that involves exchange schemes with consultancies and enhanced competency in community consultation and negotiated outcomes with a view to achieving a prescribed level of competency. R60. The appointment of a specific task force should be considered to implement the outcomes of this review and the review of enforcement policy.
Environmental risk	
F67. Environmental risk assessment methodology provides a rational, clear and transparent process for the assessment of environmental significance of emissions and activities and setting of emission limits. This approach can incorporate community concern and has been applied in a "tripartite" process for agreed environmental targets through the EIP process in Victoria.	R61. The environmental risk assessment process should be central to the assessment of emissions, setting of emission limits and the development of environmental improvement targets.

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1. BACKGROUND TO THE REVIEW

1.1. The Department of Environmental Protection (DEP) engaged Welker Environmental Consultancy (WEC) to conduct an independent strategic review of licence conditions. This review was commissioned to assess any systemic problems with the setting and implementation of licence conditions and to make recommendations to address any problems identified.

1.2. The DEP has stated that there has been a long-standing debate on the role and function of licence conditions (and indeed the role of licences themselves) between stakeholders (community and industry) and the DEP and within DEP itself. In particular, the DEP states that the following factors are believed to complicate any resolution of this debate:

- Lack of guidance in the *Environmental Protection Act 1986* (the Act) as to whether to control actual or potential emissions.
- Diverse opinions on what should be controlled by licences.
- Wide range of premises subject to licensing.
- Variable capacity and willingness of licensees to comply with conditions and go beyond strict compliance.
- Different approaches to condition setting for premises as a result of diverging opinions on what outcomes are being sought.

2. SCOPE AND APPROACH OF REVIEW

2.1. The scope of this review was modified after commencement with the agreement of DEP to enable substantial increase in the stakeholder consultation input and review of submissions. The Review included:

- Consideration of the role of licences issued pursuant to S57 of the Act and their relationship with other statutory approvals under the Act.
- Identification and addressing of stakeholder concerns and interests in the licensing process.
- Selective review of interstate licensing practices, principally Victoria and NSW.
- Preparation of a model licence to illustrate the recommendations of this review.
- Review of detailed stakeholder submissions and comments on the draft of the Review.

2.2. The enforcement of conditions was beyond the scope of this review and enforcement policy is the subject of a separate review by Dr Brian Robertson.

2.3. To accomplish this review the following approach was employed:

- Desktop review of interstate practices and the existing and proposed amendments of the Act, selected WA licences and associated policies and administrative procedures.
- A targeted consultation program involving members of the Stakeholder Reference Group and associated groups and individuals to provide input to the Review.
- Identification and review of key issues that arose during the Review.
- Development of findings and recommendations on keys issues.

- Formulation of a recommended model licence.
- Stakeholder briefings on draft Review Report and detailed review of stakeholder submissions and comments on the draft Review Report.

2.4. Where the term "emissions" is used in this report it may be taken to mean the "emission," as defined in the proposed amendments or the "discharge of waste or emission of noise, odour or electromagnetic radiation".

3. PERSONS CONSULTED

Table 1 below provides a list of those persons consulted during the Review.

Table 1 Persons consulted during the Review

Person	Organisation
Stakeholder Reference Group members	Stakeholder Reference Group
Sue Graham-Taylor	Conservation Council of WA
Rachel Siewert	Conservation Council of WA
Lee Bell	Contaminated Site Alliance
Lee McIntosh	Environmental Defenders Office
Sandy Boulter	Environmental Defenders Office
Bob Humphries and staff	Water Corporation
Roman Mandyczewsky and staff	Western Power
Don Glennister	Alcoa
Stephen Genomi	Alcoa
Environment Committee	Chamber of Minerals and Energy
Environment Committee	Chamber of Commerce and Industry
Tony van Merwyck	Freehills
Brad Wylynko	Mallesons
Tim McAuliffe, Michelle Andrews and Philip Hine	DEP Staff
Bernard Bowen	EPA Chairman
Rob Sippe	EPA Services Unit

4. REVIEW OF DRAFT REPORT

4.1 REVIEW PROCESS

A draft report was provided to the Department of Environmental Protection and stakeholders represented on the Stakeholder Reference Group in December 2002.

Briefings on the draft report were provided to the Stakeholder Reference Group and the following representatives on this Group:

- Conservation Council of WA
- Environmental Defenders Office
- Chamber of Minerals and Energy
- Chamber of Commerce and Industry

Written submissions were received from the following:

- Chamber of Commerce and Industry
- Chamber of Minerals and Energy representative on the Stakeholder Reference Group.
- Conservation Council of WA jointly with the Environmental Defenders Office.
- Contaminated Site Alliance representative on the Stakeholder Reference Group.
- Department of Environmental Protection
- Eastern Metropolitan Regional Council Representative on the Stakeholder Reference Group
- Water Corporation

Notes on the draft Review Report were also provided by DEP to the reviewer from the Environmental Impact Assessment and Regional Services Divisions in DEWCP.

4.2 SUBMISSIONS ON DRAFT REVIEW REPORT

Submissions (excluding notes from Divisions of DEWCP) to the Review are reproduced in Appendix 1 as follows under:

- General overall comment on the Review
- Additional issues
- Specific comments on recommendation and findings

The submissions have been reviewed and responses are reflected in changes to the main report.

5. NEW SOUTH WALES AND VICTORIAN APPROACH

5.1 NEW SOUTH WALES

5.1. The principal Act under which industry is regulated in NSW is the *Protection of the Environment Operations Act 1997* (POAE Act), administered by the NSW EPA. The POAE Act sets out a schedule of activities which require a licence. Licences cover both the initial development work, (pre-construction approval – equivalent to works approval), and subsequent operation. Scheduled activities can be premises based, or non premises based to cover mobile plants.

5.2. New proposals requiring planning approvals are dealt with under the *Environmental Planning and Assessment Act 1970* (EPA Act). The EPA Act provides for a public review process and second and third party appeals to the Land and Environment Court. The process allows for referral to NSW EPA. Licence conditions are developed at the same time as the proposal is being assessed by the determining authority and are included as part of the development consent. Subsequently NSW EPA issues licences when determinations are complete.

5.3. Public processes under the POAE Act apply to application for licence variations which do not involve assessment under the EPA Act. Under the POAE Act licences must be reviewed every three years.

5.4. The POAE Act allows for the development of Protection of the Environment Policies. The Action for Air Policy provides an overall strategy for dealing with air quality in NSW, but provides little guidance for industry. The Clean Air (Plant and Equipment) Regulations 1997 provide air quality emission standards. These are based on 1995 NHMRC emission standards and are due for review.

5.5. Water quality standards are included in the Clean Waters Regulations 1972, and provide discharge limits for different classes of waters. Other relevant guidelines include Protection of the Environment Operations (General) Regulation 1998 which establishes the load based licensing system, the Approved Methods and Guidance for the Modelling and Assessment of Air Pollutants in New South Wales, Aug 2001, and the Assessment and Management of Odour from Stationary Sources in New South Wales and Technical Notes, Jan 2001.

5.6. The POAE Act specifies the types of conditions that can be placed on licences. They include conditions:

- requiring monitoring and certification and relating to other matters;
- for mandatory environmental audits;
- requiring pollution studies and reduction programs;
- relating to tradeable emission schemes and other schemes involving economic measures;
- for financial assurances;
- for remediation work on premises;
- for insurance cover;
- to take effect later;
- for positive covenants;

- relating to waste; and
- post-closure requirements for waste facilities or other licensed premises.

5.7. The POAE Act specifically states that these are examples and not to be taken to exclude other types of conditions.

5.2 VICTORIA

5.2.1 Licensing process

5.8. The *Victorian Environment Protection Act 1970* (the VEP Act) is the principal legislation establishing the Victorian EPA (Vic EPA) and providing the powers and framework for protecting the environment. The VEP Act was amended in 2001 to include a number of environment protection principles and the specific requirement that these principles should be considered in administering the VEP Act. These principles are being incorporated in policies when they are amended.

5.9. The purpose of the VEP Act is to create a legislative framework for the protection of the environment in Victoria having regard to the principles of environment protection.

5.10. The principles of environmental protection are:

- Integration of economic, social and environmental considerations.
- The precautionary principle.
- Intergenerational equity.
- Conservation of biological diversity and ecological integrity.
- Improved valuation, pricing and incentive mechanisms.
- Shared responsibility.
- Product stewardship.
- Wastes hierarchy.
- Integrated environmental management.
- Principle of enforcement.
- Principle of accountability.

5.11. The VEP Act establishes a range of statutory instruments for regulating discharges or deposits of wastes to the environment from industry, including works approvals and licences.

5.12. Under the VEP Act, industries with potentially significant impacts on the environment are scheduled under the Environment Protection (Scheduled Premises and Exemptions) Regulations 1996. Industry classification and size provide the main basis for scheduling. However significant sources of specific pollutants also provide the basis for scheduling of otherwise non-scheduled premises.

5.13. Industries that are scheduled are required to obtain a works approval prior to carrying out any works that will change the nature or quantities of wastes from the premises. Once a works approval has been issued and the works are completed in accordance with the works approval as assessed by the Vic EPA, a licence is issued to operate the plant unless a licence

is not required (a few industries). The works approval system ensures that the plant is properly designed and constructed to acceptable standards, and the licence ensures that the plant is operated in an environmentally sound manner.

5.14. Licence and works approval conditions are developed at the same time. This means that proponents know the operating standards that they will be required to meet and design equipment accordingly. The Vic EPA assessment focuses on ensuring that the plant design can meet environmental requirements to avoid problems after construction. In some cases, works approvals can be made conditional on the installation of further controls should this prove necessary post construction.

5.15. The works approval process (and licence process in the absence of a works approval) is a public process, has statutory time requirements for completion of the various steps, and allows for second and third party objections and appeals. It allows for input by the public, the responsible planning authority, the department of human services, and the Minister responsible for administering the Minerals and Resource Act.

5.16. Works approvals may be conditional on planning approvals being issued and the approval may not be issued if the Department of Human Services objects on the basis of public health.

5.17. Environment Protection Policies and Waste Management Policies provide the basis for works approvals and licences, which must be consistent with policy. For air discharges, the relevant policy is the State Environment Protection Policy (Air Quality Management). The SEPP includes emission limits as schedules that were intended to be deleted from the revised SEPP because they were no longer considered useful. However, they were retained because of objections during the review period and are normally applied and permitted under the VEP Act. There is also a State Environment Protection Policy (Ambient Air Quality) which sets the ambient standards.

5.18. For water there are a number of catchment specific policies with an umbrella policy, the State Environment Protection Policy (Waters of Victoria) which is currently under review. Other relevant policies include the State Environment Protection Policy (Prevention and Management of Contamination of Land), the State Environment Protection Policy (Groundwaters of Victoria), the State Environment Protection Policy (Siting and Management of Landfills receiving Municipal Waste), & the Industrial waste management policy (Prescribed Industrial Waste).

5.19. The special types of conditions that the Vic EPA can place on works approvals and licences and other regulatory notices include the following. The penultimate condition is a catch all condition giving the Vic EPA very wide powers to set conditions.

- install pollution control equipment to the Vic EPA's specification;
- operate pollution control equipment to the Vic EPA's satisfaction;
- provide the Authority with a financial assurance;
- provide monitoring equipment to the Vic EPA's specification;
- carry out a monitoring program including source and ambient;
- do whatever else the Vic EPA considers necessary to protect the environment or preventing, controlling or abating pollution; and
- require data by NATA registered bodies.

5.20. Accredited licences are available to Companies that can demonstrate good environmental management performance. To be eligible for an accredited licence, a company must:

- have an environment improvement plan in place;
- have conducted an environmental audit;
- have a certified environmental management system in place; and
- satisfy the Vic EPA of their ongoing environmental performance capabilities.

5.21. Accredited licensees have less complicated licences that provide for site emissions and reduced licence fees. They are also permitted to undertake minor site works without the need for works approval. There are currently 19 accredited licensees listed on the Vic EPA's data base distributed throughout the Vic EPA regions (6 in West Metropolitan, 7 in Gippsland, 2 in Yarra, 3 in South West, 1 in East Metropolitan, and none in North East and North West). The performance audit report by the Auditor General (AG), Victoria, "Managing Victoria's air quality, June 2002" notes that:

"....by the end of 2001, only 17 of the 1300 companies licensed by the Authority, (for all areas of the environment) had achieved accreditation since the scheme's introduction in 1994 ……This suggests that only a small number of companies in Victoria are ready to take on the extra responsibilities of accreditation. The requirement for a certified Environmental Management System is understood to be a major block to seeking accreditation."

5.22. By way of comparison, the AG's report notes that there were currently 51 Environment Improvement Plans (EIPs) in place, about half of which were adopted voluntarily (the rest were required by licence), and the voluntary uptake is running at about 3-4 per year.

5.23. The requirement for a certified EMS can be off-putting to smaller enterprises with fewer resources and in-house expertise than larger companies. The benefits of accreditation have probably more PR value whereas the EIP process has proven very effective with the local community.

5.24. Furthermore, Gunningham and Sinclair in their report entitled “Evaluating Environmental Regulation” conclude that there is little evidence that the accredited licensing system in Victoria or the certified licence system in Western Australia has resulted in overall environmental improvement. These authors doubt whether it is worthwhile redesigning these instruments to obtain better outcomes.

5.2.2 The role of policies in works approvals and licences

5.25. The VEP Act establishes State Environment Protection Policies (SEPPs) and Industrial Waste Management Policies (IWMPs) as key instruments that provide the basis for managing wastes and maintaining environmental quality in Victoria. Section 20C of the VEP Act requires works approvals and licences to be consistent with policy.

5.26. The policy process is a public whole of Government process that includes extensive consultation across the whole spectrum of government agencies, industry, individuals, and community groups. Policies are required to be tabled in Parliament, and can be disallowed by either House. The policy development process is time consuming and resource intensive, and can typically require over 2 years to complete.

5.27. The Vic EPA has the lead role in developing and administering these policies. However, the policies are not Vic EPA policies as such, but State Government Policies, and hence are legally binding in Victoria.

5.28. State Environment Protection Policies provide a structured approach for protecting the environment which includes:

- establishing the area to be protected and boundaries of any area affected;
- identifying the beneficial uses to be protected;
- selecting environmental indicators to be employed to measure and define the environmental quality;
- establishing environmental quality objectives; and
- establishing the program for attaining and maintaining the environmental quality objectives.

5.29. Emission controls in licences derive largely from the attainment programs in SEPPs. The air and water SEPPs have various requirements for application of commonly available technology, good control practice, best practice, best available control technologies, and reductions to the maximum extent achievable. Emission limits are included in schedules in both policies, but in many cases tighter limits are applied on the basis of the general policy provisions for best practice, commonly available technology, etc.

5.30. The water SEPP includes minimum control requirements for classes of discharges as a policy schedule. For air, minimum control requirements have included a Protocol for Environmental Management, under the air SEPP.

5.31. In addition to statutory policies, there are a number of Vic EPA guidelines that provide guidance for industry and are used as the basis for licences. They include the Best Practice Environmental Management Guidelines and Guidelines for Environmental Management. Compliance with some of these is specifically required in the water SEPP and can therefore be seen as more legally binding. However, in practice, compliance with these can be included as conditions of licences and works approvals, and enforced through those channels.

5.32. More recently, the Vic EPA has introduced Protocols for Environmental Management (PEMs) under the air SEPP (and in the draft amendments to the Waters of Victoria SEPP). These are developed following the same process as SEPPs, and hence have the same legal status as SEPPs. There are currently two PEMs, one covering minimum control requirements for stationary sources and the other covering greenhouse gas emissions. Other PEMs are planned.

5.33. SEPPs and IWMPs provide a number of advantages for works approvals and licence. These include:

- Statutory backing. This comes from their status as Government instruments.
- Parliamentary backing. This derives from the requirement to obtain parliamentary assent in both houses of parliament.
- Certainty for industry. Minimum requirements are detailed. Various provisions can lead to more stringent requirements, but the underlying principles are included.

- Certainty for environmental officers. SEPP and IWMP requirements provide licensing officers, in particular, with clear guidance on minimum standards, and the basis for more stringent requirements.
- Flexibility. Depending on how they are written, policies can make provisions for exemptions from some requirements and specify the basis for exemptions, provided environmental objectives are not compromised.
- Policy Instruments. Policies can establish other instruments for providing guidance for industry. PEMs are one example and guidelines specifically referenced are others. Less formal instruments such as best practice guidelines have indirect policy backing through SEPP requirements to comply with best practice.

5.34. The main disadvantages of SEPPs and IWMPs include:

- Resource requirements. These can be quite large because of the need to research background information, develop alternatives, assess potential policy impacts, prepare discussion papers and explanatory notes, and participate in and service the various consultation processes.
- Development time. The various formal and informal steps make the development or major review of a policy in under 2 years unrealistic.
- Difficulty in varying policy. This arises from the political nature of the process, as well as the resource and time requirements. PEMs were introduced to make SEPPs easier to vary. Although the development of PEMs and SEPPs follow the same process, altering or developing a PEM does not involve any change to the SEPP, and hence can be undertaken as a self-contained exercise.
- Political influence. This can be both an advantage and a disadvantage. The need to have policies acceptable across the political spectrum can slow down the development of SEPPs. It could also make some provisions more difficult to include, although this has not been a major issue in practice. The advantages of having parliamentary backing across party political lines are obvious.

6. KEY ISSUES IDENTIFIED IN THE REVIEW

6.1. Consultations with stakeholders and the desktop review identified a number of issues that may be categorised under the following key issues:

1. Role of licences
2. Sustainability
3. Stakeholder involvement in the licensing process
4. Scope of licence conditions
5. Consistency with Part IV and Works Approvals
6. Best practice or reasonable and practicable measures
7. Cumulative impacts and managing environmental capacity
8. Emission limits and ambient standards in licences
9. Review and term of licences
10. Enforcement
11. Content of conditions
    - Inconsistency
    - Preambles and context statements
    - Unreasonable and arbitrary conditions
    - Ambient monitoring
12. DEP capability
13. Environmental risk

6.2. Based on the consideration of these issues and the submissions on the draft Review Report a numbers of findings and recommendations are made. These recommendations are then illustrated through the presentation of a model licence in Section 21.

6.3. Comments and submission on the draft Review Report raised some additional issues which are addressed in Section 20 including:

- Moving goal posts
- Matters to be considered when setting conditions
- High priority issues

7. ROLE OF LICENCES

7.1. Most stakeholders believe that the role of licences is not well understood by the DEP or by stakeholders in general. Some consider the Act is antiquated and reflects environmental regulation of the 1970s. The administration of the licensing provisions by DEP is also seen as reflecting this period and is entrenched within the DEP culture.

7.2. Community stakeholders maintain that a licence is the only statutory vehicle that can require licensees to undertake action or keep within limits – "keeping the beast in its cage". These stakeholders are very critical of a self-regulation approach because they feel they have no redress under codes of practice or voluntary industry guidelines if they are breached. They feel that the regulator can play an intermediary role between the community and the stakeholder, can enforce emission limits and should respond to community concerns and amend licences accordingly. Otherwise the community will continue to lose confidence in the licensing process if it is not administered in this way.

7.3. Community stakeholders have expectations that the licensing process should address other environmental issues besides emissions but this is not possible because licences are limited under the Act to considering the impact of emissions.

7.4. The relationship between Ministerial Statements issued under Part IV of the Act, works approvals and licences is not well understood by stakeholders.

7.5. Industry stakeholders see the licence as a consent to discharge and some defence against offences under the Act albeit only limited. This consent provides some certainty in being able to operate a prescribed activity. Licensees also see a licence as being a simplified and relatively readily understood reflection of the requirements of the EP Act.

7.6. Some industry stakeholders indicated that it may not be possible for detailed aspects of the works to be available during the environmental impact assessment process under Part IV of the Act. Similarly details as to the operation of the equipment may not be available during the works approval process.

7.1 EXISTING AND PROPOSED STATUTORY CONTEXT

7.7. The long title of the Act indicates that the Act is to provide (amongst other things) for the prevention, control and abatement of environmental pollution. Under proposed amendments to the Act the object of the Act would be "to protect the environment of the State having regard to the following principles":

1. The precautionary principle:

   Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.

   In the application of the precautionary principle, decisions should be guided by-

   a. Careful evaluation to avoid, where practicable, serious or irreversible damage to the environment; and

   b. An assessment of the risk-weighted consequences of various options.

2. Principle of intergenerational equity:

   The present generation should ensure the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations.

3. Principle of the conservation of biological diversity and ecological integrity:

   Conservation of biological diversity and ecological integrity should be a fundamental consideration.

4. Principles relating to improved valuation, pricing and incentive mechanisms:

   1. *Environmental factors should be included in the valuation of assets and services.*
   2. *The polluter pays principle – those who generate pollution and waste should bear the cost of containment or abatement.*
   3. *The users of goods and services should pay prices based on the full life cycle costs of providing goods and services, including the use of natural resources and assets and the ultimate disposal of any waste.*
   4. *Environmental goals, having been established, should be pursued in the most cost effective way, by establishing incentive structures, including market mechanisms, which may enable those best placed to maximise benefits and/or minimise costs to develop their own solutions and responses to environmental problems.*

5. Principle of waste minimisation:

   All reasonable and practicable measures should be taken to minimise the generation of waste and its discharge to the environment.

7.8. The Act (and under the proposed amendments) provides the following key statutory instruments to achieve the object of the Act:

- Environmental Protection Policies developed by the EPA and approved by the Minister (effectively Government policies). Statutory policies provide a framework for instruments such as Ministerial Statements, works approvals and licences. Under the proposed amendments the Chief Executive Officer (CEO) may impose, where warranted, more stringent requirements through licence conditions. The current Act requires licences to be consistent with approved policies.
- General offences for occupiers including pollution (and environmental harm under proposed amendments), compliance with prescribed standards and not taking all reasonable and practicable measures to minimise emissions (addressed later in this report).
- Regulations.
- Ministerial Statements that permit the implementation of proposals following environmental impact assessment of all environmental aspects (including emissions) of proposals by the EPA. This is in essence a development consent for a proponent which can integrate Government decision-making.
- Works approval which is a consent to an occupier issued by the CEO to enable the construction or alteration of works on prescribed premises that may cause an emission or alter the characteristics of emissions. The works approval process involves the assessment of the environmental performance of proposed works and the acceptability of potential emissions.
- Licence which is a consent to an occupier to emit from prescribed premises.

- Pollution abatement notices (environmental protection notices under the proposed amendments to the Act) may be served by the CEO to redress emissions that are contrary to approved policies, standards or to prevent pollution.
- Orders to cease an operation may be issued by the Minister if an occupier is not in compliance with a pollution abatement notice (PAN).
- Directions may be issued by the CEO where pollution (including material or serious environmental harm under the proposed amendments) is occurring.

7.9. The above shows there are a number of instruments, in addition to licensing, available under the Act to assess and manage environmental outcomes arising from emissions from prescribed premises. However, DEP in its submission views licences as a more powerful and flexible tool and less draconian than PANs and directions. Nonetheless where pollution arises or may arise on prescribed premises, PANs or directions are likely to be more suitable instruments to address polluting situations.

7.10. The Keating Review recognised two levels of approval:

- primary approvals – those at the outset determine whether a project can proceed (such as Part IV approvals).
- secondary approvals – these are obtained after primary approvals have been given. These approvals include licences under Part V of the Act. These approvals were not considered in detail in the Keating Review.

The Keating Review reinforces the importance of the Part IV approval processes for yes/no decisions for substantial projects and presumes that licences are more an expression of ongoing compliance requirements.

7.11. Licences have a primary role to ensure ongoing operations that pose substantial environmental risk from emissions are kept environmentally acceptable. In some circumstances licences can be a vehicle for enhancing performance where environmental circumstances or prescribed standards or policies have changed. Licences should not be considered as the primary instrument for abating pollution.

Determining environmental acceptability

7.12. One of the main intentions of the Act is to ensure the environmental acceptability of all phases (construction, operation and closure) of a proposal or work is determined before the commencement of construction. A licence that is issued after a works approval or Part IV approval becomes, amongst other things, more a tool for maintaining operational compliance or control of emissions rather than an assessment of the acceptability of the emissions.

7.13. Upfront assessment of acceptability of emissions provides the opportunity to run assessment processes concurrently. However, this has not been the practice in WA. In other States (Victoria and NSW) conditions that may apply to works approvals are made available during the development consent process, and licence conditions during the works approval process. Indeed the licence and works approval stages are often run in parallel in Victoria.

7.14. The Conservation Council and Environmental Defenders Office in their submission on the draft Review Report agree with assessment of environmental acceptability at an early stage but point out that subdivision decisions for prescribed premises under planning legislation are made before DEP become involved in the assessment of a works approval application.

7.15. DEP in its submission on the draft Review Report agrees that more information should be available on pollution prevention during the Part IV process, but indicated that that any draft conditions made available during the Part IV process should not be subject to appeal under the Part IV process. DEP did not support the incorporation of draft works approval and licence conditions into the EPA bulletin.

7.16. The EIA division commented that proposed licence conditions should not become incorporated into Ministerial Statements as this would create a cumbersome and untimely process for subsequent amendments to licences and Ministerial Statements. Conducting the processes in parallel is seen to be beneficial but a common approval process is not.

7.17. Non-Government stakeholders support the assessment, availability and publication wherever possible of draft licence conditions during Part IV and works approval processes. The Chamber of Commerce and Industry believes this is an issue that should be addressed as a priority.

7.18. The purpose of making available likely conditions during the Part IV process is to enable the EPA to provide advice that appropriate controls will be in place. If the EPA does provide such advice it would seem unreasonable to restrict stakeholder's comment on such advice during the Part IV appeal process.

7.19. The overlap between conditions of Part IV approval and licence conditions may be unavoidable if equipment, processes or emission limits are prescribed in the Ministerial Statement through the description of the proposal, key characteristics or management plans required by conditions.

7.20. DEP in its submission indicated that, for existing premises a re-assessment of measures on a periodic basis may be required to ensure environmental acceptability.

7.21. The circumstances under which such re-assessment of environmental acceptability can be triggered and whether such re-assessment can be done in the absence of re-consideration by EPA under Part IV (assuming a Part IV approval is in place) is not clear. The CEO may amend a licence condition or revoke or suspend a licence provided notice and an opportunity is given for a response from the licensee. Such re-assessments provide an opportunity to address new information but on the other hand also reduce certainty in the licence process and may create anomalies between the approvals under Part IV and Part V of the Act.

7.22. The issue of coordinated, concurrent or integrated assessments under the Act is addressed further in Section 11. An outline of the current licensing process as prescribed under the Act is provided in Figure 1 below.

7.2 WHAT IS A LICENCE?

7.23. The definition of a licence is not well understood by many stakeholders.

7.24. The Act does not provide a definition of a licence but S56 of the Act indicates that occupiers of prescribed premises who cause or permit or alter an emission are required to have a licence and that emissions are to be in accordance with conditions of the licence. In other words a licence is a consent obtained by occupiers for emissions from prescribed premises.

7.25. The extent to which this consent should be prescribed in a licence through conditions was the subject of considerable comment by almost all stakeholders. This issue is addressed in detail below.

Why have licences?

7.26. The question was raised during this Review as to whether licences are required at all. Are these instruments relevant to modern environmental protection practices and could other instruments under the Act (such as an extended works approval or Part IV approval) adequately manage emissions from prescribed premises?

7.27. The question is beyond the scope of this review but it must be appreciated that historically licences were generally used to bring polluting industries into compliance and to manage the ongoing emissions to ensure pollution was prevented or avoided. The licence provided the licensee with a protection or security against an action for pollution (S74) where the licensee could demonstrate that the "pollution" arose from emissions that were in accordance with the licence.

7.28. In addition, a licensing process was seen as being required for ensuring ongoing management of emissions and stakeholder involvement as well as a mechanism for changes to emissions that may not have required a works approval and the trading of emissions.

7.29. Many suggest that emissions from certain activities should require the consent of the community because of the potential community and environmental risk posed by the activity. By definition (in theory!) those activities prescribed should define those activities that pose the greatest environmental risk or are of the greatest community interest. However, the existing process for defining environmental risk is not clearly defined or understood. This could potentially lead to over prescription of relatively insignificant activities or some industries that may be environmentally significant not being prescribed.

7.30. DEP indicated in its submission that it is legally constrained to focus on emissions that pose a significant environmental risk and therefore it is not clear to what extent community concern should influence the assessment of environmental risk and the setting of licence conditions.

7.31. Conditions may be imposed on these licences to take measures to minimise the likelihood of pollution occurring. The definition of pollution and an unreasonable emission, under the current Act or proposed amendments, suggests that community concerns are an aspect that can be legitimately considered and need to be addressed in the assessment of licence applications and setting of licence conditions.

7.32. Many stakeholders agreed that contemporary licences should not legitimise pollution from prescribed premises and that it is no longer appropriate to prescribe an activity with a view to bringing the polluting activity into line through the licensing process.

7.33. Comments made during the review process indicated that there are various definitions of the term "pollution". The definition of the term pollution used in this Review has been taken from the definition in the Act as follows:

"pollution means direct or indirect alteration of the environment

a. to its a detriment or degradation;

b. to the detriment of any beneficial use; or

c. of a prescribed kind,

7.34. As stated above, the Act contains many instruments including PANs, directions and regulation powers to address unacceptable emissions. Such instruments may be applied on an industry wide or individual basis.

7.35. However, where new policies set higher environmental standards existing licences may be a useful mechanism (as an alternative to regulations) to bring prescribed premises into compliance over time.

7.36. The degree to which emissions should be prescribed is addressed later in this report (refer Section 14).

Findings summary

Stakeholder comments received on the draft review report suggest there is broad agreement with the findings and recommendations on this issue presented in the draft report. The main points to arise in comments included:

- Availability of licence conditions during Part IV and works approval assessment processes is supported by all stakeholders and DEP.
- Concurrent (and integrated or common) assessment processes for works approval and licences and Part IV is supported by all stakeholders. A common or integrated approval process is not supported by DEP under current legislation.
- Some concern was expressed that DEP has not been consulted on emissions from prescribed premises prior to decisions being made under planning legislation.
- DEP maintained that re-assessment of existing licences may be required from time to time to determine if controls ensure environmental acceptability.
- DEP finds it difficult and restricted in the consideration of community concern when assessing licences.
- All stakeholders agree that a licence is to emit not to pollute (as defined under the Act) and that PANs or directions should be used where activities are polluting.

F1. There are a number of other instruments available under the Act that are effective in the control of emissions from prescribed premises. Licences should not be considered as the primary instrument for abating pollution that may arise but are a mechanism to ensure ongoing compliance on prescribed premises.

F2. The roles of licensing and other statutory instruments under the Act are not well understood by the community. The licence is the last "link" in the environmental approval chain for works or proposals and is an effective tool to ensure ongoing compliance of operations in circumstances of substantial environmental risk. Licences can be used to require improvements in performance in line with changes to prescribed standards or policies or new environmental information suggests a substantial change in environmental risk.

F3. The environmental acceptability of a proposal or work is best assessed upfront through environmental impact assessment under Part IV and the assessment of works approval applications rather than the subsequent licence application. This approach adds certainty to the process for the applicant (provided the proposal or works has been completed in accordance with those approvals), and encourages more effective community input to decision-making during early stages of the design and development of the proposal or work.

F4. Decisions (subdivision) taken under planning legislation that may pre-empt or pressurise decisions under Part V are of concern to some stakeholders.

F5. Availability of information on the controls, emissions and likely licence conditions during the Part IV environmental impact assessment or works approval stage would also reduce the "pressure" on the licensing process and assist in upfront determination of the acceptability of emissions. Integration of environmental approval processes under the Act may be difficult under the existing or proposed amendments to the Act.

F6. The purpose of making available likely licence or works approval conditions during the Part IV process would be to enable the EPA to provide advice on the conditions and for stakeholders to comment on this advice during the Part IV appeal process. All stakeholders providing comment supported concurrent assessments (and integration of approval processes) and the upfront provision of information early in the environmental approvals "chain".

F7. A licence provides a useful mechanism to give effect to emission trading and environmental offsets determined under an appropriate policy or agreement framework.

F8. The circumstances and process for the re-assessment of existing licences are unclear. Such re-assessment has led to suggestions of "moving the goalposts" and creating unnecessary uncertainty in the licensing system. There is the potential for licence re-assessments or reviews to create anomalies between approvals under Part IV and Part V.

F9. The definition of an unreasonable emission (that is an emission that unreasonably interferes with the health, welfare, convenience, comfort or amenity of any person) under the current Act or proposed amendments to the Act suggests strongly that community issues/concern can be legally taken into account in setting licence conditions to prevent or mitigate pollution.

F10. A licence is not the most appropriate instrument (PANs and directions are better alternatives) to bring known polluting (as defined under the Act) activities into line but it may be an effective instrument to facilitate the implementation of changes to formal policies. Industry and community stakeholders seem to be in agreement with the principle that a licence is a consent to emit but not to pollute.

Recommendations

R1. Environmental acceptability of emissions and management controls from prescribed activities should be determined wherever possible during the Part IV and works approval assessment processes rather than in the licensing process.

R2. Administrative procedures should be developed in consultation with key stakeholders to address the process and circumstances for the re-assessment or review of licences.

R3. Wherever practicable, the likely conditions that may apply at the works approval stage should be available during Part IV environmental impact assessment and similarly the licence conditions and information on operational controls and emissions should be available at the works approval stage.

R4. The integration and rationalisation of environmental approval processes should be addressed by the next major review of the Act but in the interim Part IV, works approval and licence assessments should be run concurrently wherever practicable.

R5. Administrative procedures should be developed between the Western Australian Planning Commission and DEP to enable advice on the acceptability or likely conditions that will apply to prescribed works before decisions under planning legislation are made.

R6. Administrative procedures should be developed to encourage concurrent assessment of proposals under Part IV of the Act and works approval and licence applications.

R7. Draft works approval and licence conditions should be provided to the EPA and published in the EPA bulletin to enable stakeholder comment during the appeal period on the EPA advice provided on these conditions.

R8. The role of licensing should be considered carefully during the next major review of the Act but in the interim a licence should be considered as appropriate where there is need for:

- an ongoing dialogue between the community, DEP and the licensee on environmental performance;
- ongoing compliance and reporting of emissions because of the potential environmental risk posed by an activity;
- giving effect to emissions trading and offsets (within an appropriate formal policy context); and
- bringing activities into line with new or changes to approved policies and changed environmental circumstances.

R9. In principle, polluting (as defined under the Act) activities should not be dealt with through licence conditions but preferably through notices or directions even on licensed premises.

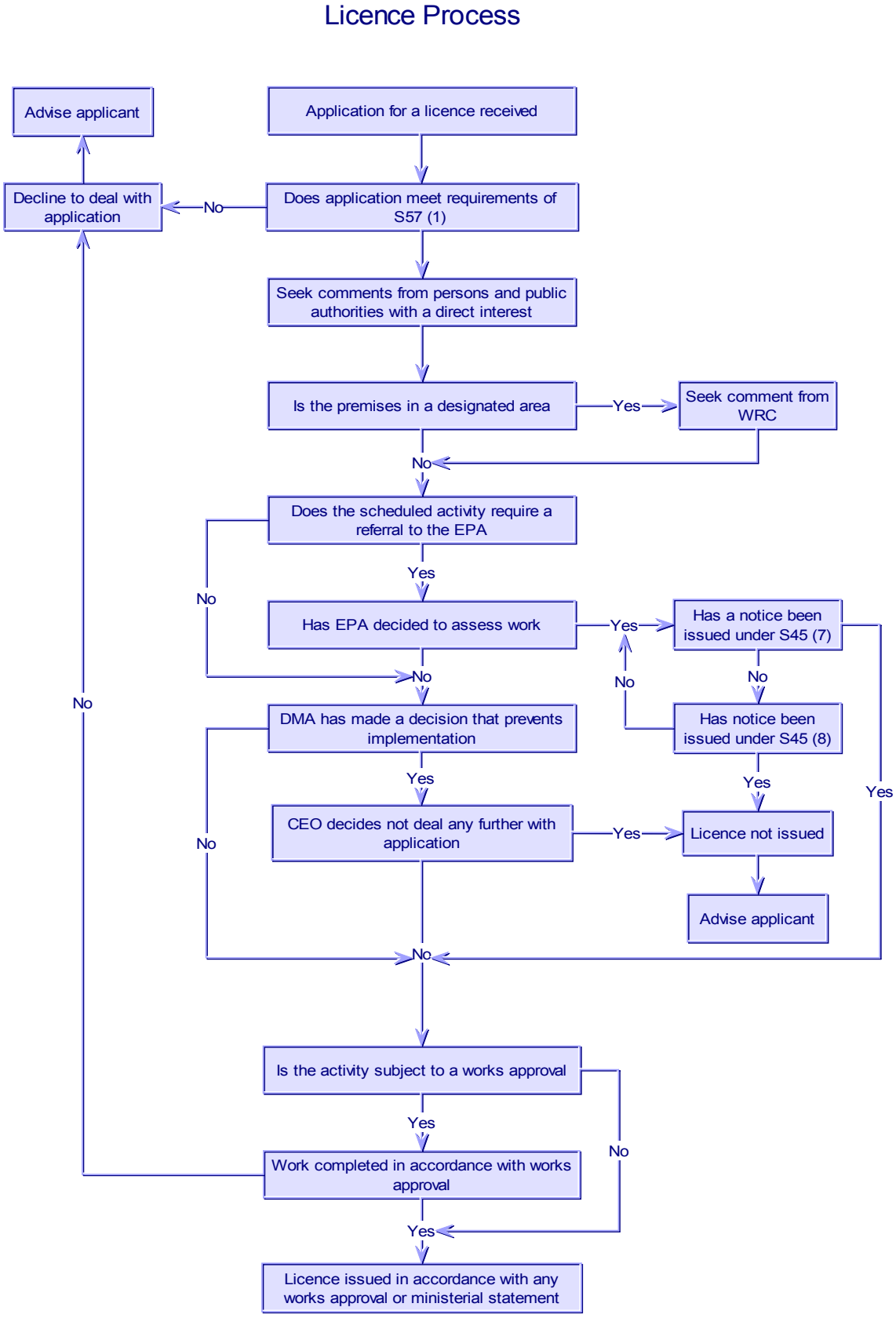

Figure 1 Licence process

8. SUSTAINABILITY

8.1. A number of stakeholders during the Review raised the prospect of licences being more in line with principles of sustainable development and some stakeholders suggested that such a general sustainability condition should be imposed on licences.

8.2. Sustainability is a term difficult to define but is much easier to understand or describe when considered in terms of sustainability objectives. The United Nations Commission on Sustainable Development proposed that the objective of sustainability should be:

"to ensure socially responsible economic development while protecting the resource base and the environment for the benefit of future generations".

8.3. The Review of Project Development Approval Systems by Independent Review Committee (Keating Review) concluded that integrated assessment of major projects and strategic planning within a sustainability framework is essential to ensure balanced development. Strategic plans can in turn provide a framework for smaller proposals which may not have the capabilities to conduct detailed sustainability assessments. The Keating Review recommended that proponents of major projects should prepare a sustainability statement that addresses the economic, social and environmental impacts of the project. This statement would be assessed against sustainability criteria based on the Government's Sustainability Strategy (currently available as a draft).

8.4. The Draft Sustainability Strategy for Western Australia was recently released and will eventually form a sustainability framework for all approval processes. The current draft refers to the voluntary preparation of industry covenants by large developments. A move in this direction has occurred with the Gorgon Development being required to prepare an Environmental, Social and Economic Strategic Review for consideration by the Government.

8.5. The Water Corporation in its submission on the draft Review Report points out that there are many different "types" or definitions of sustainability - environmental sustainability, ecological sustainability and triple bottom line - that add to the difficulty of defining what is meant by "sustainable" development.

8.6. The current intent of the Act is understood to restrain the EPA and the DEP from considering economic and social factors in their assessment (except possibly in determining reasonable and practicable measures). However, Ministerial decisions and the development of formal policy may not be so constrained. These matters and other matters raised in submissions relating to sustainability principles are important issues that warrant detailed consideration.

8.1 PROPOSED PRINCIPLES UNDER THE ACT

8.7. The proposed amendments to the Act, while not specifically mentioning sustainable development, present a number of principles that are consistent with the concept of sustainability (refer Section 7.7 above).

8.8. These principles may be considered to reflect some of the environmental aspects of sustainability and may be addressed in the administration of the licensing process. The proposed principles however, do not directly refer to the engagement of the community or transparency in the process of determination of policies or licence limits –vital ingredients in the achievement of sustainability. The Conservation Council and the Environmental Defenders Office in their joint submission on the draft Review Report maintain that transparency and environmental justice should also be included as principles under the Act.

8.9. Other sustainability principles may be worthy of consideration – the Victorian EP Act has ten principles. Such consideration should be comprehensive and should be conducted as part of the next major review of the Act.

8.10. The Conservation Council and Environmental Defenders Office contend that the CEO should be required to take into account sustainability objectives. They argue that under the proposed amendments to the Act such objectives only generally direct the licensing actions and policy. Further amendments would be required to the Act to specifically require the CEO to take such matters into account. Such changes should be considered in parallel with an appropriate set of sustainability principles and the scope of "sustainable licences" during the next major review of the Act.

8.2 APPLICATION TO LICENSING

8.11. Sustainability can provide the policy and intellectual framework for the administration of the licensing function. This does not mean that licensing should address matters other than the management of emissions but ultimately approval processes under the Act and perhaps planning legislation should be rationalised to enable a wider spectrum of issues to be considered before development consent occurs.

8.12. The Chamber of Minerals and Energy representative on the Stakeholder Reference Group and the Chamber of Commerce and Industry in their submissions on the draft Review Report suggest that sustainability recommendations relate more to the administration of the licensing process rather than sustainability issues. This observation is correct. The approach taken in this review was to indicate how the licence process may be administered to facilitate achievement of sustainable outcomes. The review did not consider criteria, factors or the policy framework for assessment of sustainable development. These are matters that will be the subject of policy development processes under the Act and outcomes of the WA draft Sustainability Strategy.

8.13. The licensing process, as currently defined under the Act, has a limited role in the assessment of sustainable development. The process can play a part by ensuring ongoing compliance of emissions to help maintain the sustainability of the activity. However, the capability of the present licensing process to facilitate achievement of sustainable outcomes can be substantially enhanced by the recommended changes to the administration of the process and the creation of an appropriate policy context.

8.14. The approach recommended by the Keating Review to ensure sustainability varied according to the size of the development. Major developments would be assessed early on an individual basis in the process of development approval and small and medium sized projects would need an appropriate policy and planning framework to ensure sustainability. This review did not address what policy framework or sustainability criteria are required to assess developments.

8.15. The administration of the current approval processes under Part V of the Act, can play a role in facilitating sustainability through the following:

1. Development of appropriate policy framework (addressing sectoral, activity types, environmental segments or local areas) to guide licensing practices.
2. Application of the principles proposed under amendments to the Act in licensing and policy development processes.

3. Engagement of the community as a partner in the licensing and policy development processes.
4. Consideration of licensing issues in the broader environmental context and as early as possible in the environmental approval "chain".
5. Transparency, clarity and certainty in the administration of the licensing and policy process.
6. Direct engagement of the community by the licensee in conjunction with the regulator to seek agreed outcomes for improved environmental performance as required.
7. Public reporting of environmental performance (both good and bad) by licensees and the regulators.
8. Positive incentives for licensees to achieve improved environmental performance on an ongoing basis.
9. Independent auditing of environmental performance (voluntarily in environmental improvement plan process or required where substantial environmental risk persists).

8.16. The legislative framework required to address the characteristics of sustainable development (other than waste minimisation and the administrative elements discussed below) in the licensing process goes beyond the scope of this current review but warrants detailed consideration in the next major review of the Act. Under such a review it is anticipated that the following (amongst other things) will be addressed:

- the role and scope of "sustainable licences";
- rationalisation of environmental approvals under the Act;
- sustainability criteria and framework; and
- development of a comprehensive set of sustainability principles (and how they will be applied).

Development of administrative procedures, policies and guidelines

8.17. Issue of licences in the absence of an appropriate policy and planning framework is unlikely to effectively address cumulative emissions, local community concern, equity, certainty, consistency, transparency and local area considerations.

8.18. A number of criticisms from all stakeholders may be attributed to the current depauperate procedural framework and policy base for the administration of works approvals and licences. The DEP recognises this deficiency and has applied resources to commence the preparation of policies. This is a matter that needs to be addressed urgently.

8.19. An effective planning and policy framework may include the following:

- Sector or individual agreements or plans – a current example is the development of an agreed program between the Water Corporation and DEP for environmental improvements to wastewater treatment plants around the State. In Tasmania under the *Environmental Management and Pollution Control Act 1994* environmental agreements (which in effect are contracts) may be entered into between the regulator and an operator of a premise, industry or group of industries, or agreements may be made between persons. The current Act or proposed amendments to the Act in WA do not directly provide a head power for such agreements.

- Neighbourhood (including catchment) environmental improvement plans are a means to address more local or catchment issues such as cumulative emissions (including unlicensed/diffuse sources) and environmental quality. Recent amendments to the Vic EP Act enable the Vic EPA to authorise the preparation and approve of such plans which can address a broad spectrum of environmental issues. Approved individual or groups of local authorities can prepare these plans. The current Act or proposed amendments to the Act in WA do not provide a head power for such plans.
- Environmental protection policies may be prepared under current legislation to provide either a state or regional framework for environmental protection. Very few policies have been prepared to date because of the resource and time commitments required for the DEP to complete the required statutory process. In Victoria state wide and regional air and water quality, land and noise policies have been in place for some time and provide a substantial foundation for environmental protection and certainty in the licensing process. Agreements could form a more flexible and cost effective basis for policies.
- National Environmental Protection Measures are applied through the Act.

8.20. The processes for the preparation and the involvement of stakeholders in the policy process being developed by DEP, have yet to be articulated. An alternative to the approach of "publish and defend" draft policy proposals is the negotiated agreement approach. Under this approach licensees, the community and the regulator would jointly prepare policies at the instigation of the regulator. If this process fails the regulator may "go it alone" down the conventional road of "publish and defend". Currently there are no head powers under the Act to enable such agreements to be prepared and given effect. Tripartite agreements can be seen as a convenient alternative means of producing policy.

Engagement of the community

8.21. Considering only scientific environmental criteria will often neglect the community's perceptions and anxieties associated with emissions and the presence of nearby industrial activities. Processes that encourage the engagement of the community can help identify and more effectively develop environmental targets and emission limits that also address community concerns. If an agreement can be reached between the industry, the regulator and the community an optimal environmental and operational outcome for the licensee is achieved.

8.22. Fears arising from the presence of a facility nearby or odours that are perceived to be indicative of hazardous chemicals are all "social aspects" of emissions that can only be addressed through engaging the community. The community is now demanding a much greater role and consideration of their concerns in decision-making. Communities may expect industry to obtain their "consent" to locate in their area. The definition of unreasonable emission and pollution under the Act reinforce the need to address community concerns.

8.23. This of course does not mean abandoning a sound environmental risk assessment approach but rather to ensure that the community concerns are addressed in the risk assessment process.

8.24. The involvement of stakeholders in the licensing process is addressed in detail in Section 9.

8.25. The Chamber of Commerce and Industry expressed concern in its submission that disaffected stakeholders only become engaged after consultation and decision-making have

been completed. The Chamber is also concerned that Government may use consultation to abrogate its representative and decision-making role. The specification of rules for engagement is important in this regard.

Consideration of licensing issues in the broader environmental context

8.26. Sustainability means that, in the future, environmental assessment should involve a more holistic consideration of environmental issues including the consumption of natural resources, greenhouse gas emissions and the usage of the capacity of the environment to accommodate waste or impacts. This may evolve into an "environmental licence" that replaces the numerous environmental approvals currently required. Such changes would require substantial amendments to the Act.

8.27. Licensing should be sensitive to "social" aspects (amenity, well being, comfort etc) of emissions and would be more effectively addressed if coordinated or integrated with the environmental assessment processes under Part IV of the Act.

Transparency, clarity and certainty

8.28. The degree of transparency, clarity and certainty, and trust and confidence in the licensing process are directly related. The codification of community involvement in the process and giving reasons for decisions add to the transparency and clarity. Many stakeholders expressed the view that the licensing process needs to be more transparent and consistent.

Direct engagement of the community by the licensee and regulator

8.29. The processes for development of licence applications and environmental improvements provide the opportunity for engagement of the community. This is addressed in detail later in Sections 9 and 12.

8.30. As mentioned above environmental agreements provide the opportunity to engage stakeholders at the sector, catchment or individual or groups of premises levels.

Public reporting of environmental performance and positive incentives

8.31. Those licensees that pursue an EIP process will most likely report on an annual basis on their environmental performance. Positive incentives to encourage good performance are addressed later in this report (Section 12.4). On the other hand those licensees that are consistently poor performers (regular non compliances) may be identified on the DEP website.

8.32. Those licensees that are not subject to an EIP process should provide reports on environmental performance at the time their licence is reviewed or upon the request of the CEO.

Independent auditing of performance

8.33. Currently licensees report on compliance with licence conditions to the DEP. Some stakeholders were of the view that compliance needs to be independently verified if DEP cannot audit the premises itself. These stakeholders also maintained that the compliance auditor should be accredited by the DEP and in the extreme chosen by DEP.

8.34. DEP has established an accredited auditor scheme for compliance auditing.

8.35. The proposed amendments to the Act specifically enable the CEO to require, as a condition of a licence, compliance audit reports. The greater use of independent compliance auditors, accredited by DEP for the preparation of compliance reports would enhance confidence in the licensing process.

8.3 SUSTAINABILITY COVENANTS

8.36. The use of sustainability covenants in Australia is limited. These covenants would address wider sustainability issues and would be prepared on a voluntary basis. The current Act does not have a head power for the preparation of sustainability covenants. This matter should be addressed in the next major review of the Act

Victorian experience

8.37. Sustainability covenants were recently introduced in Victoria with the passing of the Resource Efficiency Act in June 2002.

8.38. The basic elements of the legislation provide for a declaration by the government that an industry or segment of an industry has the potential to have a significant impact on the environment. Once this happens, the industry can either develop and enter into a sustainability covenant with EPA, or can be required to produce an audited public statement of environmental impact, and subsequently be required to develop and implement a plan for increasing resource efficiency, and reduce ecological impacts.

8.39. The basic approach is similar to that used in the packaging covenant, i.e., either enter into voluntary agreement or comply with a legislated requirement (in this case, the used packaging National Environment Protection Measure).

8.40. Sustainability covenants are potentially a very powerful instrument for addressing environmental problems far beyond what can be addressed in traditional instruments such as licences and works approvals. Covenants can cover not only resource efficiency in producing goods and services, but also the ecological impact of those goods and services. The requirements of a sustainability statement given below illustrate this point.

- what resources the enterprise or process is using and in what quantities those resources are being used;
- how the resource use efficiency of the enterprise or process can be improved;
- the actual or potential ecological impacts of the enterprise or process and of the products or services produced by the enterprise or process; and
- how those impacts can be reduced.

8.41. At present there are no guidelines or mechanisms for developing or assessing sustainability issues. Vic EPA has been looking at the ecological footprint methodology and is engaged in partnership in a number of pilot projects exploring the use of the concept for fostering sustainability.

8.42. DEP in its submission has indicated that it is addressing the issue of sustainability through specific initiatives including:

- compulsory annual compliance reporting;
- introduction of the EIP similar to that operating in Victoria an South Australia; and

- development of independent audit criteria.

8.43. The Chamber of Commerce and Industry in its submission emphasised that EIPs should be voluntary.

Findings summary

Stakeholder comments received on this issue in the draft Review Report generally support the thrust of the recommendations and suggest that licensing can play a role in maintenance of sustainable development and can be administered to facilitate sustainability. DEP indicated that it is already addressing some aspects raised in recommendations and the Chamber of Commerce and Industry and Chamber of Minerals and Energy representatives on the Stakeholder Reference Group indicated that while the recommendations are more administrative they would be good changes of advantage to the community, regulators and industry.

The Conservation Council and Environmental Defenders Office support the thrust of the Review but see the process just beginning in terms of regulation's role in facilitating sustainable development. They believe the Act requires additional principles and amendment and are concerned that there should be sufficient resources and an appropriate policy framework established for licensing.

There was some concern expressed by the Chamber of Commerce and Industry that Government must not use consultation as a mechanism to abrogate its representative and decision making role.

F11. Sustainability can provide the necessary intellectual and strategic framework for the licensing process. A strategic framework has not been established in WA but the draft Sustainability Strategy is the first stage in this process.

F12. The current licensing process prescribed under the Act has a limited role in the assessment of sustainability of new proposals or works. However, the capability of the present licensing process to facilitate achievement of sustainable outcomes can be substantially enhanced by the recommendations of this Review for the administration of the process and the creation of appropriate procedures and policy context.

F13. The set of principles under the proposed amendments to the Act are incomplete but provide some basis for the implementation of sustainability.

F14. The current procedural and policy framework for licensing is grossly inadequate. DEP has enhanced policy development but the process for stakeholder involvement in the preparation of these policies has yet to be articulated.

F15. Negotiated "tripartite" environmental agreements may be an alternate option to the development of formal policies under the Act. However, there is currently no head power for such agreements to be prepared and given effect under the Act.

F16. The current administration of the licensing process lacks transparency, clarity and certainty because of the lack of a policy framework and systematic licensing procedures and guidelines.

F17. The application of EIPs has been a very useful mechanism in Victoria to promote environmental improvement in situations where there is substantial community concern or uncertainty in the assessment of environmental risk. The preparation and implementation of EIPs may be facilitated through the licensing process. There is considerable debate on whether EIPs should be voluntary or required in the first instance through a licence

condition. The emphasis of this review is to encourage the voluntary preparation (but enforcement of implementation through licence conditions) of EIPs except where there are changes to prescribed standards, policies or environmental circumstances.

F18. Independent auditing or assessment of environmental performance by DEP accredited auditors particularly in situations of intense community interest would enhance community confidence in the licensing process.

Recommendations

R10. The licensing process should have regard for community engagement and the principles under proposed amendments to the Act.

R11. In addition to the above, the following should be implemented to facilitate sustainable development:

- Development of an appropriate sectoral, activity, environmental or local area policy framework.
- Consideration of licensing issues in the broader environmental context as early as possible in the environmental approval "chain".
- Development of administrative procedures in consultation with stakeholders to ensure transparency, clarity and certainty in the administration of the licensing and policy process.
- Encouragement of direct engagement of the community by the licensee in conjunction with the regulator to seek optimal outcomes for improved environmental performance.
- Public reporting of environmental performance (both good and bad) by licensees and the regulators.
- Positive incentives for licensees to achieve improved environmental performance on an ongoing basis.
- Independent auditing of environmental performance where required.

R12. DEP should, in conjunction with stakeholders, develop guidelines for stakeholder involvement in the licensing process and the preparation of policies.

R13. The negotiated agreement approach should be used for the development of licensing policies, procedures and guidelines in preference to the traditional "publish and defend" approach.

R14. The sustainability principles required, application of sustainability criteria and the role of licences in achieving sustainability should be addressed in the next major review of the Act.

R15. Consider further changes to the Act to provide head powers and general procedures for:

- Preparation and implementation of negotiated environmental agreements.
- Preparation of neighbourhood, catchment or local area environmental improvement plans by approved persons.
- Accreditation of independent environmental auditors.
- Positive incentives/reward schemes for environmental improvement.

Refer also to recommendations in subsequent Sections.

9. STAKEHOLDER INVOLVEMENT IN THE LICENSING PROCESS

9.1. Community stakeholders were critical of the licensing and works approval processes from several points of view:

- lack of opportunity for commenting on licence applications or licence reviews or renewals (except by appeal);
- lack of opportunity to comment on proposed licences and involvement in the condition setting process;
- lack of codification of consultative procedures in the licensing process;
- more independent verification of consultant reports;
- a tripartite approach should be adopted in the determination of licence conditions;
- lack of ready access to licence documents (sometimes freedom of information requests need to be submitted to obtain copies of licences);
- advertising of licence amendments provides no information on the subject of the amendment; and
- no reason for decision or assessment report is made available to the public with draft or final licences.

9.2. Community stakeholders particularly emphasised community involvement as being critical to achieving trust in the process and sustainable development.

9.3. Some stakeholders representing licensees believe that the current licensing process can allow a small proportion of the community to have a disproportionate effect on licence conditions with no net improvement in environmental outcomes. It was asserted that on occasions regulators have been pressured to make ill-directed or misinformed decisions on regulatory requirements. Community stakeholders strongly dispute these assertions.

9.4. Furthermore industry stakeholders believe DEP should exercise leadership by defining a clear process for considering community input to condition setting. Guidelines should be established on what constitutes adequate consultation with the community, after which conditions should be set with a clear scientific link to protection of the environment. These stakeholders contend that all stakeholders would benefit if the Government developed and published a defined and transparent process for managing media and community inquiries and pressure.

9.5. The current and historic process for licence renewal or amendment often does not allow for meaningful consultation between the regulator, the applicant or licensee and the community.

9.6. Community stakeholders appear to be unfamiliar with the works approval process and more readily recognise the licence than the works approval process as a vehicle to address issues of concern. However, the environmental acceptability of the work or proposal is determined at the Part IV assessment or works approval stage (in the absence of Part IV assessment). Consequently, the opportunities to influence the design of the work or proposal during the licensing process are very limited. The licence process addresses in more detail how the premises will operate rather than whether the development is appropriately located or emissions are environmentally acceptable. It is therefore important to encourage involvement of the community and consideration of emissions at the earliest available stage of environmental assessment when decisions on acceptability are made.

9.7. There are opportunities to conduct the works approval and Part IV assessment processes concurrently or to make available conditions that may apply to a works approval during the Part IV assessment to provide opportunities for stakeholder input. Such conditions are made available to the development consent process (under planning legislation) in NSW.

9.8. However, some industry stakeholders believe that not enough details on works are available at the time of Part IV assessment. These stakeholders maintain that the Part IV process is meant to address environmental acceptability at an early stage before design details are available. On the other hand environmental groups believe the design of a proposal and operational management needs to be addressed during assessment under Part IV to judge whether the proposal is environmentally acceptable. Notwithstanding these divergent comments there is an increasing demand from the community to have more information presented upfront on the management and design of proposals. The deferral or delegation of such considerations is not supported. The opportunity for community involvement is more limited and at best is not well codified under current works approval and licensing processes.

9.9. Similarly licence and works approval applications and conditions could be assessed and developed concurrently (as in Victoria) and made available during the works approval process. This means that the community and licensee have an opportunity to concurrently comment on the operating standards and performance of equipment options. DEP maintains that a works approval cannot be used as a site approval process but site characteristics may influence the conditions that may be imposed.

9.10. The Act currently requires the CEO to seek comment from persons and public authorities with a direct interest in the subject matter of the application. No guidelines (or guidance is provided by the Act) are available on what constitutes a "direct interest" or the consultative process to be followed. This has led to uncertainty as to the extent of stakeholder involvement in the licensing process and lack of transparency, clarity and trust in the conduct of the process.

9.11. Administrative procedures or guidelines on community and applicant/licensee consultation and access to information are required to provide certainty and transparency in the conduct of the process.

9.12. The preparation of an assessment report to accompany draft licences and works approvals would facilitate community and applicant understanding of the basis for emission limits and conditions imposed. The Conservation Council and the Environmental Defenders Office maintain in their submission that DEP should provide its reasons for decision on licences and maintain these on a publicly available register. They argue that the publication of reasons for decision would encourage DEP to be more disciplined and systematic in their decision-making.

Findings summary

There was general support for the recommendations from the Conservation Council, the Environmental Defenders Office and the East Metropolitan Region Council representative on the Stakeholder Reference Group. There was some support for recommendations but also some concern in submissions from DEP and industry stakeholders about the potential delay to the process from stakeholder review. There was support for stakeholder involvement provided it is codified and that timeframes were established for the process including responses and actions by DEP.

DEP have indicated that it does not have the resources or funding required to conduct the stakeholder process indicated in Figure 2. The Chamber of Commerce and Industry does not support a four week

public review of a draft licence unless the licence review period is beyond five years or more or where works are proceeding in accordance with EIP.

The Conservation Council and Environmental Defenders Office, in their submission, point out difficulties and complexities in determining people with an "interest" as prescribed under the Act. They argue that there needs to be legislative change to enable anyone to make submissions but in the interim the CEO has sufficient discretion under the Act to consider submissions from any person.

F19. There are opportunities for works approval conditions to be made available during the Part IV assessment process and licence conditions to be developed concurrently with the works approval process. Concurrent assessment with Part IV would enable an opportunity for stakeholder comment on other issues of environmental acceptability that cannot be addressed in the licensing and works approval processes. Coordination with the planning approval process may also enable wider issues to be addressed.

F20. Stakeholder concerns are better addressed early in the development of the proposal or work to reduce the pressure on the licence application process. The licence process cannot address issues of environmental acceptability and wider environmental issues of concern. These wider environmental issues are often of primary interest to the community.

F21. The Act does not provide specific guidance on stakeholder consultation and no guidelines are available on effective consultation (DEP are currently addressing this matter). The complexity involved in defining persons with a direct interest is great and will create substantial difficulties of implementation. The process lacks transparency and has led to considerable uncertainty as to the opportunities for community stakeholders and licensees to provide input to the licensing process.

F22. The publication of an assessment report would enhance stakeholder understanding by providing the basis and reasons for the imposition of conditions.

Recommendations

R16. Stakeholder involvement should be encouraged during the works approval process when environmental standards may be determined and the design and environmental performance of a proposed work may be assessed.

R17. Opportunities for coordinated and concurrent assessment of proposals and works approval and licence applications and conditions should be pursued wherever practicable.

R18. DEP should prepare and provide assessment reports with draft and final licences to inform stakeholders as to the basis and reasons for deciding emission limits and other conditions.

R19. Administrative procedures and guidelines for stakeholder consultation during the works approval and licence processes should be prepared and include the following:

- Timeframes for the decision-making process.
- Encourage applicants to consult with community stakeholders during the preparation of licence applications.
- Opportunity for negotiations between the licensee and the DEP on proposed conditions or changes to licences during the preparation of the draft licence.

- Publish receipt of applications or amendments as follows:
  - in the local community newspaper as well as the West Australian where appropriate;
  - include a short description of the subject of the application/amendment;
  - invite community stakeholders to indicate an interest and provide submissions over a two week period (corresponding to the appeal period for setting level of assessment); and
  - advise of locations where applications may be viewed.
- Provide a copy of the draft licence/works approval together with the draft assessment report to the licensee and those community members who indicated an interest in the application.
- Determine a public review period for draft works approvals or licences the length of which would depend on:
  - the potential community interest in the application;
  - the degree of public scrutiny of licence conditions during the Part IV assessment process;
  - previous community involvement in the setting of licence conditions;
  - significance of the environmental risk associated with the subject of the application; and
  - whether the change is the result of a voluntary EIP or environmental agreement.
- Advice from Health WA on public health standards as required.
- Option for DEP to convene a conference between community stakeholders, public authorities and the applicant/licensee to resolve issues as required.
- Conduct of the EIP process.
- Publication of the licence on the DEP web page upon issue with the final assessment report.

Proposed stakeholder involvement in the licensing process is shown in Figure 2 below.

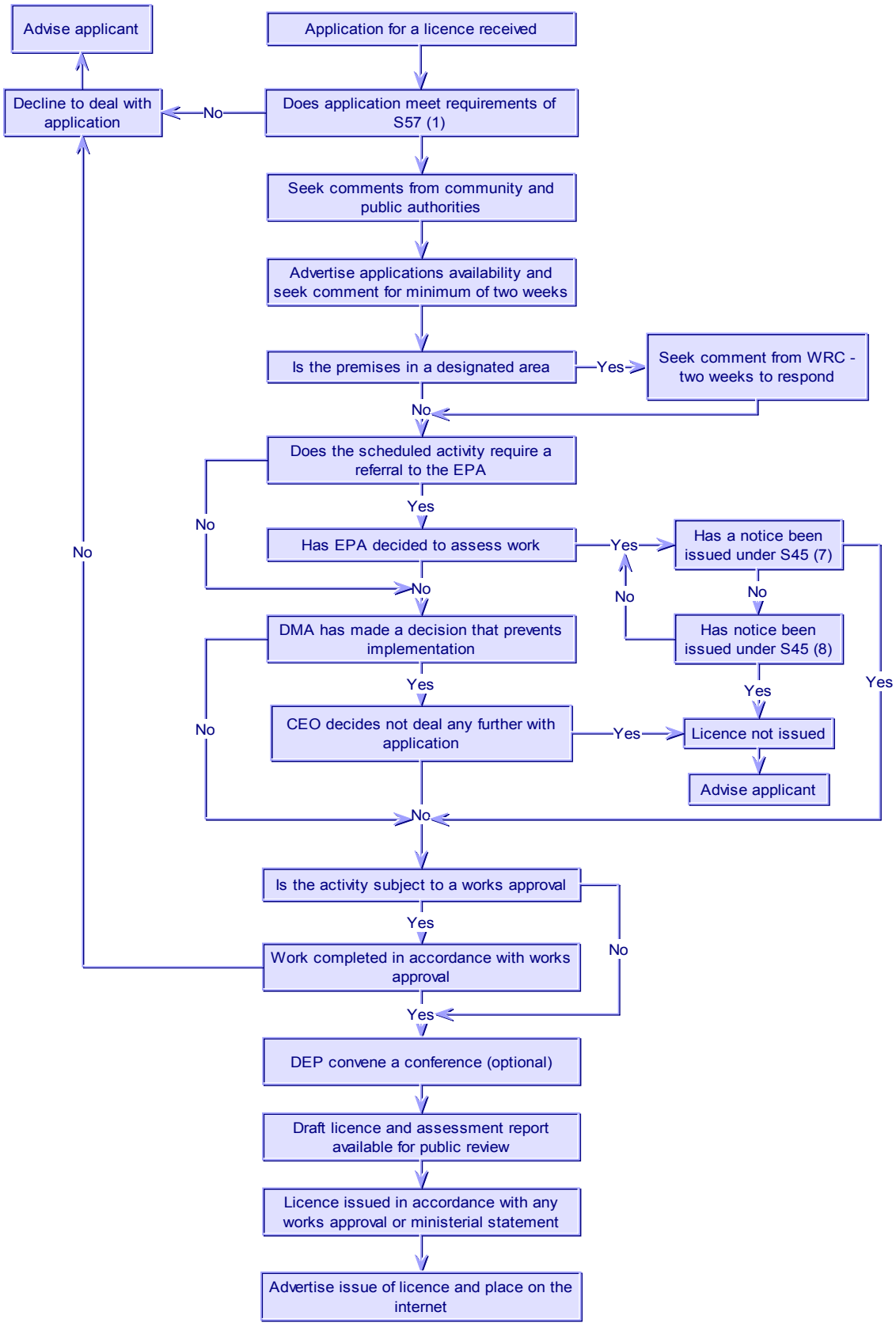

Figure 2 Stakeholder involvement in licensing process

10. SCOPE OF LICENCE CONDITIONS

10.1. The scope of conditions applied in licences was the subject of much comment by all stakeholders. Stakeholders felt that some conditions being set:

- Go beyond that empowered by the Act (hinges on the interpretation of S62)
- Are not prescriptive enough and emission limits need to be inserted to state clearly the extent of the consent being granted by a licence.
- Should reflect sustainability principles.
- Unnecessarily constrain operation with little or no environmental gain.
- Are often, arbitrary, ad hoc and not within an appropriate policy context.
- Need to prescribe emissions in more or less detail.

10.1 STATUTORY CONTEXT

10.2. The scope of conditions is prescribed in S62 of the Act. The types of conditions that may be applied would be substantially extended with S62A of the proposed amendments to the Act.

10.3. Under the existing S62 the ability of the CEO is somewhat restricted in the setting of conditions to:

- install and operate pollution control equipment;
- prescribe measures to minimise the likelihood of pollution (this is believed to be the legal basis for setting emission limits);
- provide monitoring equipment;
- implement a monitoring program;
- require re-use where practicable;
- operate equipment to prevent, control or abate pollution; and
- comply with prescribed conditions.

Conditions are required to be not inconsistent with approved policy or prescribed standards and the CEO cannot grant a licence contrary to, or otherwise not in accordance with a Part IV approval.

10.4. Substantial amendments have been proposed to S62 to enable the CEO to grant a licence subject to such conditions considered to be "necessary or convenient for the purposes of this Act relating to the prevention, control, abatement or mitigation of pollution or environmental harm". The current Act has a similar qualification for the setting of conditions under section 62(1)(c) assuming that "specified measures" can mean emission limits.

10.2 DIFFERING INTERPRETATIONS OF THE STATUTORY BASIS FOR SETTING LICENCE CONDITIONS

10.5. Some stakeholders strongly argue (based on legal advice) that the existing and proposed wording of S62 constrains the extent to which emissions may be limited by licence conditions. The argument being that emission limits in conditions should only be imposed to minimise etc pollution and not to achieve best practice.

10.6. On the other hand DEP has in the past argued equally strongly (based on Crown Law advice) that that the intent of this section is "minimising the likelihood of pollution" not merely to prevent pollution. DEP argue that it is appropriate to impose emission limits well below the level to protect health, to minimise the chances of exceedance of the health standard. This interpretation in conjunction with DEP's interpretation of 51(b) (refer Section 12) is seen by DEP as providing a substantial base on which to impose emission limits based on its assessment of "reasonable and practicable measures" which may require further reductions than those required to prevent pollution or to allow for uncertainty in determining environmental impacts (precautionary principle).

10.7. DEP in its submission on the draft Review Report indicated that the current Act focuses on minimising pollution whereas concepts such as waste minimisation gained currency after the Act was drafted. DEP is looking to the review of the Act to reconsider this focus.

10.3 DISCUSSION

10.8. This strong divergence in legal opinion has not been tested and is causing considerable ongoing antagonism between DEP and licensees and will mostly likely continue to do so unless resolved. While the community and licensees remain uncertain as to what can be required through licensing, confidence in the administration of the licensing system will continue to decline. The Act should be clear on "what are the rules of the game" and it is a major shortcoming of the Act that for so long there has been so much basic disagreement about what it is able to do.

10.9. It is reasonable to set emission limits for significant emissions to allow for uncertainty in line with the precautionary principle, however, there is substantial concern amongst stakeholders representing licensees as to the extremely conservative limits applied in some instances. On the other hand, community stakeholders would like to reduce environmental risk as far as possible.

10.10. The level of uncertainty needs to be considered in setting a limit but should not be unduly conservative. Achieving the balance should involve a process of determining the environmental risk and negotiations between the regulator, licensee and the community wherever appropriate.

10.11. The proposed amendments to the Act provide greater clarity on the ability to impose emission limits through 62A(d) which states "meet specified criteria or comply with specified limits as the characteristics, volume or effects of emissions".

10.12. Refer Section 12 below for further discussion on "best practice" and "reasonable and practicable measures".

10.13. Refer Section 14 below for detailed discussion on emission limits that may be applied in licences.

Findings summary

Stakeholder submissions which commented on this issue supported the recommendations presented in the draft Review Report.

F23. There are major conflicting views on the ability of the current Act (and the proposed amendments to the Act) to apply conditions that impose emission limits based on taking reasonable and practicable measures.

F24. Under the current Act uncertainty can be taken into account in setting emission limits or ambient standards in line with the precautionary principle. Environmental risk assessment approach would be the major consideration in the setting of limits and other conditions (refer Section 17).

Recommendations

R20. Consideration should be given to amending the Act to make it clear as to the scope of licence conditions.

R21. Emission limits imposed through licence conditions should take into account uncertainty, environmental risk, ambient levels and any approved policy.

11. CONSISTENCY WITH PART IV APPROVALS AND WORKS APPROVAL

11.1. A number of stakeholders believed that licences issued by DEP should be consistent with works approvals and approvals issued under section 45(5) of the Act (Ministerial Statements). Many stakeholders claim that DEP has issued licences that contain more stringent conditions or conditions that are at variance with conditions in Ministerial Statements.

11.2. The divergence between conditions that apply under a Ministerial Statement and licences are of concern to some stakeholders and create uncertainties for enforcement.

11.1 STATUTORY CONTEXT

11.3. Under Part IV of the Act, the EPA (where it decides or the Minister through determination of appeals requires) assesses a proposal and provides advice to the Minister on the environmental acceptability of a proposal and the conditions and procedures that should apply to the proposal if implemented. The Minister issues a Statement that the proposal may be implemented subject to conditions based on EPA advice and following consultation with other Ministers (decision making authorities). If the Minister and other Ministers cannot come to agreement on the Statement the matter is referred to Cabinet for decision.

11.4. A licence or works approval cannot be issued until the Minister issues a notice that the proposal may be implemented following issue of the Ministerial Statement.

11.5. The Act (and the proposed amendments to the Act make it more clear) requires that the CEO shall grant a licence not contrary to and in accordance with Ministerial Statements and with conditions that are not inconsistent with those of a works approval . The Act also indicates that the CEO shall issue a licence for prescribed activities that have been completed in accordance with the conditions of a works approval. Refer to Figure 1 for a diagrammatic representation of the licensing process.

11.6. In other words the issue of a licence would automatically follow where works approval conditions have been completed and the implementation of the proposal is in accordance with a Ministerial Statement.

11.7. The Act also provides an occupier with a defence against pollution if that occupier proves that the pollution resulted from emissions that complied with the conditions of a Ministerial Statement. This further emphasises the need for consistency (and avoidance of duplication) between conditions of approval under Part IV and Part V and that any application or proposed DEP initiated changes to licences must also have been adequately considered under Part IV.

11.8. It is reasonable to infer from the above that licence conditions that are inconsistent with the corresponding works approval or are not in accordance with Part IV approvals are potentially challengeable in law.

11.9. In addition, the argument has been put that conditions of licences cannot be more or less stringent than the corresponding conditions in works approvals or Ministerial Statements.

11.2 INTEGRATION/COORDINATION

11.10. The need for consistency between Ministerial Statements issued by the Minister following EPA advice and works approvals and licences issued by the CEO produces many administrative and policy challenges. Duplication and inconsistencies have occurred and

divergence in the policies and conditions recommended by the EPA and applied by the CEO increases the potential for legal challenges, confusion and lack of clarity and certainty. Stakeholders raised questions as to how inconsistencies and divergence between the two streams of approval will be managed. There is also potential for the system to be overly bureaucratic if the approvals are to be "kept in step".

11.11. Sufficient detail should be available during the environmental impact assessment process under Part IV of the Act to determine the acceptability of emissions and controls applied during the operational phase of a proposal. Under current procedures in WA the EPA often recommends to the Minister for the Environment or decides not to assess a proposal on the basis that there are processes conducted by the CEO under Part V of the Act that can acceptably manage emissions.

11.12. This approach has attracted criticism and some stakeholders believe that this "delegation" to Part V denies community involvement (which is available under the Part IV approval process) and may be questionable in law. On the other hand some stakeholders representing licensees maintain that in some cases detailed design and therefore detailed information on environmental performance is not available during the Part IV process. A Part IV approval may be required before detailed design can be funded.

11.13. This "delegation" by the EPA is outlined in Section 4.1.2(vii) of Environmental Impact Assessment (Part IV Division 1) Administrative Procedures 2002 and states that the EPA may consider "the ability of DMAs to place conditions on the proposals to ensure required environmental outcomes are achieved" in its determination of the environmental significance of the proposal. The EPA may make this determination in the absence of advice on the conditions that may be applied in licences or works approval and a detailed assessment of the operational controls and impacts of emissions from the proposal.

11.14. Notwithstanding the above, the EPA may often recommend pollution control conditions to the Minister and these may be incorporated into Ministerial Statements. Those conditions are seen by DEP as potentially constraining the licensing process or requiring cumbersome and time-consuming S46 amendments to conditions.

11.15. This problem may be overcome to a substantial degree if works approval and licence conditions were provided by the CEO to EPA to consider in its assessment and released with its report to the Minister. This would also provide an opportunity for the proponent and the community to comment on the EPA's report during the appeal period.

11.16. Where an approved proposal is to be amended, the Minister refers the amendment to the EPA for advice. This process and any updating of the Ministerial Statement (and equally any proposed change to the licence) should run concurrently or be coordinated with the licensing process. The EPA may need to be informed of any proposed changes to works approval and licence conditions before providing advice on the change to the proposal to the Minister.

11.17. Integration and coordination between the Part IV and Part V processes requires serious and urgent attention and may ultimately require rationalisation in both the approvals required and the authorities that may issue approvals under the Act.

11.18. The Water Corporation in its submission on the draft Review Report believes there is an artificial demarcation between Part IV and Part V processes. This demarcation manifests itself with the expectation of a full re-assessment under Part V which often brings focus back on issues of low environmental significance often dismissed as not Relevant Factors under

Part IV. Concurrent and common assessment processes and the integration of low level Part IV processes and Part V should be explored.

11.19. The Conservation Council and the Environmental Defenders office support the correction of inconsistencies and development of administrative procedures for integration and coordination of approval processes under Part IV and Part V of the Act.

11.20. The EIA Division in the DEWCP has indicated support for the recommendations but indicates it should be optional for proponents to choose concurrent assessment as not all proponents may have enough detail to satisfy Part V application requirements. There was a concern expressed that integration of the existing process may complicate any subsequent amendments to approvals. The availability of likely licence conditions in the Part IV appeal process needs to be carefully considered.

Findings summary

Those stakeholders that made comment on this issue agreed with the recommendations presented. Most favour better coordination and eventually some form of integration of processes.

F25. Licence conditions more or less stringent than those in the corresponding Ministerial Statement may be potentially challengeable in law.

F26. There are inconsistencies and divergence between approvals under Part IV and licences and works approvals which cause a lack of clarity and certainty in the environmental outcome and enforcement.

F27. There are benefits for both the licensing and the EPA's environmental impact assessment processes if proposed licence (and works approval) conditions are made available to the EPA before it reports to the Minister under Part IV of the Act. Administering the Part IV and Part V processes concurrently will reduce inconsistencies, promote community stakeholder considerations and provide greater certainty and clarity to licensees. The development of common assessment process and approval for low-level assessments under Part IV and works approvals and licences has substantial merit.

F28. Likely licence conditions should be considered in the Part IV appeal process if the EPA's advice to the Minister is based on its assessment of these conditions.

F29. A rationalisation of approval processes, instruments and decision makers under the Act is warranted and should be considered under the next major review of the Act.

Recommendations

R22. The consistency of licence conditions with Part IV approval and works approvals should be reviewed and corrected as licences are renewed or reviewed.

R23. An administrative procedure should be developed for coordination and to encourage concurrent administration of approval processes under Part IV and Part V of the Act.

R24. A procedure for a common assessment process and approval for low level assessments under Part IV and works approvals and licences should be considered and trialled on a voluntary basis.

R25. Rationalisation of approval processes and decision makers under the Act should be considered as a priority under the next major review of the Act.

12. BEST PRACTICE OR REASONABLE AND PRACTICABLE MEASURES

12.1. The implementation of best practice licence limits by DEP was an area of great concern to stakeholders representing licensees. The arbitrary imposition of such requirements was felt to be unjustified when considered against the environmental risk posed by the activity. Too much emphasis on "one size fits all" has led to costly and bureaucratically driven process rather than a focus on environmental outcomes.

12.2. Some of these stakeholders felt licence limits should not be based on best practice technology or used to drive cleaner production objectives without regard for the competitive forces as this could result in the demise of businesses. The preparation of improvement plans or goals/targets should be voluntary and used to encourage continuous improvement initiatives. Cleaner production objectives should not be driven through licence limits but through other mechanisms such as licence targets, percentile limits and agreed management plans. The main objective of licences is to protect the environment not to be used to drive other agendas.

12.3. This concern is reinforced by a feeling that licensees are being singled out as easy targets to reduce emissions in areas where unprescribed premises are, by far, the predominant contributor to environmental degradation. Yet these unprescribed activities are not being required to reduce emissions.

12.4. Community stakeholders are uncertain as to what is meant by "best practice" or "taking all reasonable and practicable measures". How are these terms defined and who defines them? There is much uncertainty on what is best practice - is it world's best practice, which is the lowest number you can find in the world? Australia? Western Australia? or South West? In the end these stakeholders wish to see clear emission conditions that are enforceable.

12.5. Proposed amendments to the Act insert a principle of waste minimisation (S4A5) which indicates that all reasonable and practicable measures should be taken to minimise the generation of waste and its discharge into the environment.

12.6. The EPA adopts the above principle in its assessments as indicated in section 2 of its Administrative Procedures, namely:

"Where a proposal is subject to formal EIA, it is the responsibility of the proponent, through the EIA process, to demonstrate that:

i) best practicable measures have been taken in planning and designing the proposal to avoid, and where this is not possible, to minimise impacts on the environment; and

ii) the unavoidable impacts of the proposal should be found to be environmentally acceptable, taking into account cumulative impacts which have already occurred in the region, and principles of sustainability".

12.1 DEP APPROACH

12.7. The DEP advises that its pollution prevention licensing system is based around several main principles as follows:

- best practice environmental management;
- continuous improvement by industry;

- audited self management of industry; and
- 'user pays' or fee for service.

12.8. The DEP develops emission limits in licences in the following sequence:

1. Identify all significant contaminants.
2. Develop "technology based" limits.
3. Use relevant ambient standards to determine acceptable ambient limits.
4. Estimate the levels of discharges and emissions expected from the facility.
5. Estimate the likely ambient concentrations arising from the facility through modelling or calculation.
6. Compare ambient concentration levels with the acceptable ambient limits.

12.9. The above condition setting procedure shows that the approach of DEP is to firstly determine a "technology limit" before actually determining whether the emission limit proposed in the licence application is acceptable. The "technology limit" is intended to "ensure any new pollution control technology installed is the best that can reasonably be obtained". This approach is the opposite to that promoted by industrial stakeholders who contend that the impact on the environment should be considered first and if the emission complies with environmental standards there is little environmental basis to require additional reduction in emissions except in a voluntary capacity.

12.10. DEP advises that the "technology limit" based on "taking reasonable and practicable measures" should not be the lowest emissions value that is actually in practice anywhere around the world but is reasonable and practicable taking into account the circumstances of the applicant and the local environment.

12.11. The above DEP approach is based on an interpretation of S51 of the Act that any limits placed in licences or works approvals should be consistent with that section, namely that the licensee should:

- comply with any prescribed standard for the discharge of waste or the emission of noise, odour or electromagnetic radiation; and
- take all reasonable and practicable measures to prevent or minimise the discharge of waste and the emission of noise, odour or electromagnetic radiation.

12.12. This interpretation of S51 provides a statutory rationale for DEP to require ongoing improvements to licensed emissions at any stage through amendment to conditions and particularly when licences are renewed. This approach has attracted substantial criticism from licensees as it is seen as arbitrary and does not necessarily consider local circumstances of the licensee, operational practicalities or environmental risk. Also community stakeholders lack confidence in the derived limits.

12.13. The DEP interpretation of S51 (based on Crown Law advice) would suggest that all occupiers are bound to take all reasonable and practicable measures. There has not been a test case on the meaning of this section but one licensee has pleaded guilty to such an offence in the past.

12.2 DIFFICULTIES

12.14. An alternative strongly held legal interpretation of S51 by stakeholders representing licensees is that S51(b) – "take all reasonable and practicable measures to prevent or minimise the discharge of waste and the emission of noise, odour or electromagnetic radiation" - is no more than a defence available to an occupier who has breached a prescribed standard under S51(a).

12.15. There are a number of administrative difficulties in the implementation of "best practice" or "reasonable and practicable", namely:

- Vague definition of terms "best practice" and "reasonable and practicable".
- Lack of understanding by all stakeholders as to what is "reasonable" and "practicable".
- Who determines, and how are "best practice" limits and "reasonable and practicable measures" determined on a case-by-case basis?
- The potential for arbitrary imposition of best practice limits.
- The regulatory application of "reasonable and practicable" and "best practice" relies on the capability of the regulator to have near perfect knowledge of industrial processes and the individual circumstances of licensees.
- It is highly likely that both industrial groups and community groups will be sceptical about DEP being able to ever adequately fulfil the role of determining best practice limits.

12.16. This strong difference in interpretation has been known for some time and leads to lack of clarity and certainty and a loss of confidence in the licensing process. This uncertainty and differing interpretations of the meaning of S62 only promotes confusion and potentially reduces the enforceability and increases the likelihood of legal challenges to conditions.

12.3 FUTURE DIRECTIONS

12.17. The concept of reducing emissions from new sources as far as practicable is consistent with contemporary waste minimisation principles. Indeed the proposed amendments to the Act define the waste minimisation principle as

> *All reasonable and practicable measures should be taken to minimise the generation of waste and its discharge to the environment.*

This concept is widely adopted in emissions management practices interstate and overseas. There is an expectation from many community stakeholders to move towards a goal of "zero emissions". The Conservation Council and Environmental Defender Office submission indicated that the aim should be to have zero pollution.

12.18. Given the above difficulties of interpretation and definition of "reasonable" and "practicable" and the proposal to insert the above definition of waste minimisation as a principle in the Act there seems little justification in retaining the general offence (from the DEP interpretation of S51) for not taking all reasonable and practicable measures in the Act. In its submission to the draft Review Report DEP agreed with the removal of this offence. The Stakeholder Reference Group representative for the Chamber of Minerals and Energy indicated that to remove this offence, S51 should be completely removed from the Act.

12.19. The emphasis should be more on developing a "negotiated" process and policy framework for consideration of waste minimisation principles in the development of emission limits from new sources. The following may be required to enable such a process:

- amendments to section 62 to make it clear that licence conditions may take into account the waste minimisation principle under proposed amendments to the Act;
- amendments to the Act to enable environmental agreements between licensees, communities and regulators as appropriate;
- stakeholder involvement in the determination of licence emission limits; and
- voluntary application of the EIP process (involving the community) for the derivation of environmental targets for existing sources.

12.20. Notwithstanding the above, the overwhelming objective of the current Act is to ensure that any emissions are environmentally acceptable (that is they do not lead to environmental harm or pollution) taking into account the precautionary principle. The application of reasonable and practicable measures is an important consideration in the design and environmental management of the proposal/work but should not be confused with determination of environmental acceptability. DEP in its submission on the draft Review Report indicated that the application of reasonable and practicable measures is consistent with minimising the likelihood of pollution.

12.21. The CEO appears to have powers under sections 54(c) and 57(c) to require the provision of waste minimisation information in applications and could take this into account in making a decision on the application.

12.22. A formal policy or guidelines on the application of reasonable and practicable measures (the proposed waste minimisation principle) in the licensing processes is required to provide greater clarity and certainty to the community and licensees of requirements in this regard.

What is reasonable and practicable?

12.23. "Reasonable and practicable measures" do not mean world's best practice. The terms "reasonable" and "practicable" are difficult to absolutely define and include concepts common to both. For instance under the Act "practicable" is defined as:

"reasonably practicable having regard to, among other things, local conditions and circumstances (including costs) and to the current state of technical knowledge";

Reasonableness is therefore a part of the test for practicability. However, practicability refers mostly to aspects of the proposal itself whereas reasonableness may refer to the effects of the proposal.

12.24. The reasonableness test is used in many statutes. It is not defined precisely although the Administrative Decisions (Judicial Review) Act 1977 states that a decision will be taken to be unreasonable where an exercise of a power is:

"so unreasonable that no reasonable person could have exercised it in that manner".

This definition is somewhat circular and provides the courts with considerable flexibility to determine what is reasonable on a case-by-case basis.

The Oxford English Dictionary defines reasonable as:

"1. not going beyond the limit assigned by reason; not extravagant or excessive; moderate.

2. of such an amount, size, number, etc as is judged to be appropriate or suitable to the circumstances or purpose."

All of the above definitions indicate that there are many factors that have to be considered including the circumstances of the licensee, environmental risk and the characteristics of the local environment. Reasonable and practicable does not suggest "one size fits all".

Application of reasonable and practicable

12.25. Arbitrary determination of "reasonable and practicable measures" by DEP works against the definition of reasonable. For instance, applying the same emission limits in a region, where ambient levels are very low, as in a metropolitan area where significant levels exist may be considered unreasonable. Regional development is invariably more costly than development near established industrial areas. Insisting on the same level of control only encourages concentration of industry in established areas where environmental pressures are already concentrated and communities in these areas feel aggrieved. The arbitrary reduction of emission limits based alone on the regulators assessment of what is "reasonable and practicable" is inappropriate and can lead to less than optimal environmental outcomes.

12.26. The requirement to demonstrate the application of taking reasonable and practicable measures on an ongoing basis following the issue of a licence is a point of much debate. Stakeholders representing licensees believe that ongoing application of continuous improvement should be voluntary. Some community stakeholders insist that such improvements should be given effect through licence conditions to ensure that improvements are made.

12.27. The process for establishing improvements (targets) in situations where there are ongoing community concerns or intense interest is as important to the community as the targets are themselves. The community is unlikely to have confidence in the environmental targets unless it is involved in the process of target setting. In these situations a 'tripartite" negotiated agreement process involving the regulator, community and licensee (along the lines of the EIP process in Victoria) may be appropriate.

12.28. The licensee should be encouraged to undertake ongoing improvements voluntarily but where the licensee refuses to do so and there are community concerns, the regulator may require an independent audit of environmental performance (enforced through a change to licence conditions). The regulator may follow up the audit with changes to licence or enforcement action for non-compliance depending on the findings in the auditor's report. The requirement to implement the outcomes of the negotiated agreement process (refer EIPs below) may become a condition of the licence, however, the targets developed through such a process should not be licence conditions.

12.4 IMPROVING PERFORMANCE - MANAGEMENT PLANS AND IMPROVEMENT PLANS

12.29. Good environmental performers usually have environmental management systems but the existence of a comprehensive EMS does not necessarily ensure good environmental performance. The licensee and not the EMS sets environmental targets and objectives. Good environmental performance stems from commitments by management and the EMS is a mechanism for a systematic approach to implement those commitments.

12.30. DEP is currently considering the application of emission limits and targets defined as follows:

- limits – "never-to-be exceeded" and subject to rigorous enforcement; and

- targets – which are more stringent and based on improving performance and would be levels at which a response is required.

The process by which targets would be developed is not clear at this stage (Refer section 14 for details).

12.31. A proposed amendment (section 62A) to the Act provides for the preparation and implementation of environmental management plans and EIPs, as a condition of licence. The ability to require management plans provides an additional means to address environmental management procedures to control emissions and to set performance targets for industrial processes.

12.32. The application of management procedures through management plans is particularly useful where specific emission limits cannot be set quantitatively or measured accurately because of the nature of the source (diffuse or fugitive) or characteristics of the emission.

12.33. The EIP process provides a mechanism for engaging the community thereby promoting the achievement of mutually agreeable outcomes.

Victorian experience with environmental improvement plans

12.34. The preparation of EIPs have been taken up voluntarily by a number of industries in Victoria and acknowledged as being a successful instrument for continual improvement involving community and regulator in the process of setting environmental outcomes.

12.35. An EIP developed under this process must include the following elements:

- a requirement that any relevant State environment protection policy, waste management policy, regulation and licence condition must be complied with;
- emission and waste production standards for the industry;
- requirements for the monitoring of compliance with the environment improvement plan;
- provision for the participation of the community in the evaluation of the performance in meeting objectives under the environment improvement plan;
- provision for the up-grading of plant and equipment to meet objectives under the environment improvement plan;
- provision for the assessment of new or emerging technology in the industry or in pollution control; and
- provision for contingency or emergency plans.

12.36. EIP's can be developed on a genuine voluntary basis or as a result of "arm twisting" of poor performers by the EPA. These are tailored to suit the specific situation, and can include any or all of the above elements.

12.37. EIPs may be developed in response to a failure of the more formal licensing and regulatory mechanisms to adequately resolve community industry conflicts. An essential requirement in the development of an EIP is therefore the involvement of the local community at whatever level is required. Community involvement may vary from the whole process of EIP development and monitoring of progress and performance, or, only in routine reporting of performance to the community.

12.38. The EIP is a more flexible instrument than a licence. It can be used to develop agreements between industry, the community, and EPA on developing and implementing environmental improvements and addressing environmental problems for which there are no short term or immediately evident solutions, over a period of time. It can also be used to involve the community in decisions on options, eg trade offs of, for example, short term odour annoyance for better long term environmental outcomes, and in monitoring progress and performance.

12.39. This approach allows solutions to local environmental issues to be resolved at the local level, as well as allowing for the development and implementation of solutions to broader environmental issues over time.

12.40. The EIPs are acknowledged by Gunningham and Sinclair in their report entitled "Evaluating Environmental Regulation" as being a considerable success as they have empowered local communities directly and greatly improved relationships between the communities, enterprises and the Vic EPA. They have also improved environmental outcomes on issues of community concern, increased the level of trust between communities and companies and created a more predictable investment environment.

12.41. The Vic EP Act provides sufficiently wide provisions to include EIP requirements as a condition of works approval and licences. Works approvals now include a requirement for an EIP, and current licences are also being progressively amended to include an EIP requirement.

12.42. Enforcement of EIP agreements can occur at a number of levels. In the first instance, the monitoring provisions of an EIP can be used to vary targets where this is appropriate and agreed to by the various parties.

12.43. Essential elements of an EIP are the Company CEO or Managing Director as a signatory to the agreement, and public monitoring and reporting.

12.44. At the regulatory level, licences can be amended to include agreements reached in the EIP as specific licence requirements and then enforced directly.

Applicability in WA

12.45. An EIP can be used to demonstrate:

- engagement with the community;
- ongoing environmental improvements and consistency with waste minimisation principles;
- performance against industrial benchmarks;
- environmental performance in key areas of interest to the community and DEP; and
- a program to meet new prescribed environmental standards or policies.

12.46. An EIP should be prepared on a voluntary basis but its implementation may become a condition of licence (giving affect to the "tripartite" process outlined above). An EIP may be prepared in areas where there is substantial community concern or interest. In the absence of a satisfactory EIP, an independent audit of environmental performance should be required through a licence condition by the regulator.

12.47. Targets should not become emission limits in licence conditions otherwise licensees could be discouraged from setting "progressive" targets to avoid statutory sanctions for breaching conditions.

Rewarding improved performance

12.48. The accredited licence concept in Victoria and WA aims to rewards those licensees who have in place appropriate environmental management systems and a good compliance record by discounting licence fees. Very few accredited licences have been issued in WA and Victoria and some stakeholders expressed some doubts about the effectiveness of this approach in achieving improved performance – a systematic approach does not necessarily mean better performance. Many stakeholders feel that public acknowledgement of the better performers (and highlighting the poor performers) is more likely to encourage better performance than any financial rewards that may be gained through the licensing system (except maybe for those who pay very high fees).

12.49. Gunningham and Sinclair in their report entitled "Evaluating Environmental Regulation" conclude that there is little evidence that the accredited licensing system in Victoria or the certified licence system in Western Australia has resulted in overall environmental improvement. These authors doubt whether it is worthwhile redesigning these instruments to obtain better outcomes.

12.50. The US EPA has developed the National Environmental Performance Track program designed to acknowledge and recognise top environmental performers that go beyond compliance. This program was developed after extensive consultation with stakeholders. To qualify for the program a facility will need to demonstrate:

- adoption and implementation of an environmental management system (EMS);
- specific environmental performances and commit to continued improvement;
- commitment to public outreach and performance reporting; and
- a record of sustained compliance.

Once admitted to the program the participant receives benefits including national recognition on the EPA website, use of Performance Track logo and low priority for inspection.

12.51. Some form of positive acknowledgement for licensees who go beyond compliance with emission limits, engage the community and have an appropriate environmental management system would seem worthwhile. Some rewards may include discounted licence fees, use of a government approved "green logo", favourable consideration in enforcement actions and expedited approval processes.

Findings summary

DEP and those stakeholders that commented specifically on this issue expressed general agreement with the findings and recommendation in the draft Review Report including the removal for the general offence (as interpreted by DEP) for not taking all reasonable and practicable measures. The Chamber of Commerce and Industry provided cautious support to the EIP concept and emphasised that the EIP process should be voluntary. DEP indicated that it plans to introduce EIPs modelled on the Victorian and South Australian models. DEP concedes that better documentation of its decisions may clarify the manner in which licence limits are derived.

The Chamber of commerce and Industry does not support the transfer of voluntary targets to licence conditions if they are breached.

F30. The primary function of licensing under the Act is to protect the environment and not to develop "technology based limits". Demonstration of the application of the waste minimisation principle proposed under amendments to the Act (taking all reasonable and practicable measures) is a responsibility of proponents/licensees in accordance with their circumstances, community concern and the environmental risk posed by the activity. The process may involve negotiated agreements between the licensee, regulator and the community before or following the issue of a licence.

F31. The current DEP practice of insisting on "reasonable and practicable" emission limits through changes to licence conditions is strongly criticised by many licensees and relies on a favourable interpretation of S51 and S62 of the Act.

F32. Demonstrating that a new source is consistent with the proposed waste minimisation principle (taking reasonable and practicable measures) in the Part IV or works approval processes is a reasonable expectation and is consistent with modern regulatory practice.

F33. However, the arbitrary imposition of emission limits based alone on the regulators assessment of what is "reasonable and practicable" is inappropriate and can lead to less than optimal environmental outcomes. This approach adds uncertainty to the licensing process with a loss of confidence in the process from both community and licensee's perspectives.

F34. The setting of ongoing targets for improved performance in situations where there is substantial community concern may require an EIP process involving the regulator, the community and the licensee in which agreed targets for improvement can be developed.

F35. The conduct of independent audits and public reporting of environmental performance (including improvements and comparisons with industry benchmarks) where there is a substantial environmental risk at the time a licence is reviewed would add confidence and transparency to the licensing process.

F36. The need for an offence for not "taking all reasonable and practicable measures" in the context of proposed amendments to the Act and the difficulties of defining reasonable and practicable is difficult to justify. The waste minimisation principle in proposed amendments to the Act can be given effect through approved policies and consultative/negotiation processes rather than through an offence provision under the Act.

F37. The proposed amendments to the Act enable licence conditions requiring the preparation of EMPs and EIPs.

F38. The EIP process has proved very successful in Victoria as it emphasises voluntary preparation of EIPs and a tripartite process where agreement is achieved between the community, regulator and licensee.

F39. The EIP has a role in:

- demonstrating improvement in environmental performance,
- comparison to industrial benchmarks;
- consistency with environmental principles;
- promoting engagement with the community; and
- documenting improvement programs to meet new environmental standards.

F40. Taking punitive action against those persons for breaching targets that go beyond statutory compliance will discourage progressive commitment to environmental performance. The enforcement of voluntary targets is a critical issue that needs to be resolved.

Recommendations

R26. The Act should be amended to ensure that the waste minimisation principle proposed under amendments may be considered by the CEO in the setting of conditions and the general offence for not taking all reasonable and practicable measures (DEP's interpretation of S51) should be removed from the Act. This may be accomplished by the removal of S51.

R27. A formal policy/guideline should be prepared, through a negotiated process with stakeholders, on how the waste minimisation principle in the proposed amendments to the Act will be applied in the licensing process. This policy should also address what is considered "reasonable and practicable".

R28. "Reasonable and practicable" should not be driven by technology alone but also consider environmental risk and the circumstances of the individual licensee.

R29. World's best practice should not be considered to be "reasonable and practicable" unless it can be demonstrated as such.

R30. Proponents should demonstrate (as required by EPA) taking all reasonable and practicable measures during the Part IV assessment process. Where a Part IV approval process is not required, the works approval applicant should be required to demonstrate in the works approval application that such measures have been applied. If there is dispute between the works approval applicant and the regulator on the application of the proposed waste minimisation principle, an independent expert should be engaged to provide advice.

R31. The ongoing application of the waste minimisation principle following the issue of a licence should be on a voluntary basis through an EIP process.

R32. DEP should in situations where there is substantial community concern encourage the licensee to voluntarily undertake an EIP and amend the licence to ensure the EIP is implemented. Where a licensee refuses to prepare an EIP or produces an unsatisfactory EIP, DEP should require an independent audit of environmental performance and implement the results of the audit through amendment to licence conditions

R33. DEP should, in conjunction with relevant stakeholders, review its enforcement policy to ensure that licensees voluntarily taking up the EIP process are not unnecessarily penalised for not meeting targets in the EIP. Civil rather than criminal sanctions are more appropriate for breaches of EIPs or environmental agreements.

R34. Targets prepared through the EIP process should not be specified as licence limits in licence conditions.

R35. A scaled reward system should be developed by DEP following extensive consultation with stakeholders, which rewards those licensees that go beyond compliance and engage the community (EIP process) and have an appropriate environmental management system in place.

R36. DEP should develop guidelines for the preparation of EIPs and community involvement in this process.

13. CUMULATIVE IMPACTS AND MANAGING ENVIRONMENTAL CAPACITY

13.1. Community stakeholders expressed concern that licences are being issued without considering cumulative impacts. Some other stakeholders felt that the current licensing system does not readily enable environmental offsets to be achieved. Environmental offsets are seen as an option which can achieve more cost effective environmental outcomes.

13.2. In some parts of the State where State Environmental Protection Policies are in place (Kwinana and Kalgoorlie) air dispersion models and air monitoring networks have been developed and are available to forecast and assess the impact of additional sources of sulphur dioxide. In some instances DEP has, on a case by case basis, in the absence of formal policy arbitrarily set low emission limits to compensate for anticipated ambient levels of emissions from other sources or to allow for future development.

13.3. DEP in its submission on the draft Review Report does not consider cumulative impacts are a significant issue that needed to be addressed through the licensing system because existing and proposed EPPs and the EIA process have dealt with this issue. DEP are not clear on whether neighbourhood agreements are an appropriate tool for managing cumulative impacts.

13.4. The ability of the licensing process in WA to rationally consider cumulative impacts from both licensed and unlicensed sources is limited in the absence of approved policy and subregional models. The development of neighbourhood environmental plans or environmental agreements (refer section 8 above) are mechanisms which could address cumulative impacts on a local basis and provide a framework for licensing.

13.1 NEIGHBOURHOOD ENVIRONMENTAL IMPROVEMENT PLANS AND ENVIRONMENTAL AGREEMENTS

13.5. Neighbourhood environmental improvement plans may be considered analogous to catchment or natural resource management plans. The process for development of neighbourhood plans would be similar but they would address all environmental segments (air, land, water and noise) and sources of environmental degradation.

13.6. Recent changes (July 2001) to the Victorian EP Act enable a Neighbourhood Environment Improvement Plan to be developed in partnership by all parts of the community, including, but not limited to, the residents, special interest groups, local Government, local industry and other agencies such as EPA. The objective of the plan is to improve and sustain the local environment for everyone. These plans tackle the issues that local communities identify as important to their health, safety and enjoyment of their local environment. They are intended to address environmental issues of importance to the community at the local scale, such as the cumulative impacts of many small sources of pollution, or working towards a sustainable neighbourhood.

13.7. The Victorian EP Act 1970 specifies that a 'protection agency' must submit both the Neighbourhood EIP proposal, and plan, to EPA. The protection agency acts on behalf of the neighbourhood community to take the proposal and subsequent plan through the formal stages of EPA endorsement and approval that are required under the Act. Examples of protection agencies include local councils, catchment management authorities, water authorities or government departments such as the Department of Natural Resources and the

Environment or the Department of Infrastructure. The protection agency's role could be described as one of 'sponsor' for the Neighbourhood EIP.

13.8. The need for a plan is assessed on the basis of a number of criteria including demonstrated environmental problem (e.g. breach of environmental standards, amenity effect), high level of community concern and the presence of multiple or diffuse sources.

13.9. Environmental agreements are new innovative tools that are in essence contracts binding all parties. The subject of an agreement may include environmental management or improvement of operations over an industrial sector or a number of premises, or sharing environmental capacity at one or more premises. Entering into agreements would be voluntary but may be encouraged by the regulator. The regulator may approve agreements but agreements can be between licensees, licensees and the community or regulator and licensees. The model for an environmental agreement presented in the Tasmanian Environmental Management and Pollution Control Act 1994 should be considered.

13.2 ALLOCATING ENVIRONMENTAL CAPACITY

13.10. The normal function of the regulator is to allocate "environmental capacity" on the basis of proponents meeting both environmental standards and appropriate discharge limits in the first instance. This approach can ensure licensees do not receive an allocation of environmental capacity beyond their reasonable requirements.

13.11. There are major difficulties in establishing rules for retention of environmental capacity in licensing as such rules would most likely be arbitrary. The sharing or trading of capacity is a market function based on Government policy and not an environmental issue even though regulatory agencies should consent to trades or offsetting arrangements.

13.12. DEP in its submission maintains that emitting industries do not have an automatic right to take up the environment's assimilative capacity and that its decisions to reserve environmental capacity are legitimate and consistent with minimising the likelihood of pollution. DEP indicated that these reasons could have been better documented.

13.13. It is reasonable for DEP to be cautious in setting emission limits in new licences in the light of limited information to prevent pollution and in line with the proposed waste minimisation principle. But to further restrict the use of environmental capacity just to preserve opportunities for future development is unreasonable in the absence of formal Government policy.

13.14. The representative for the Eastern Metropolitan Regional Council on the Stakeholder Reference Group in his submission on the draft Review Report indicated that there is community concern relating to potential or perceived impact on health regardless of the environmental conditions imposed. There are scientific and technical difficulties in establishing links between symptoms and emissions and these issues are unlikely to be easily resolved through community consultation.

13.15. The consideration of cumulative health risk or the health risk posed by a premises in the licensing process when there is little scientific information on cause and effect or established criteria is a major policy issue. There is an obvious need for a formal, clear and concise policy on the consideration of risk to health in the licensing process particularly in regard to contaminants of major concern. Such a policy would need to address health and ecological risk assessment, ambient health criteria, methodologies to develop risk criteria, community involvement, and ambient and source monitoring.

Findings summary

F41. In the absence of adequate policy and regulatory framework cumulative emissions, trading and environmental offsets are unlikely to be adequately addressed. The current Act and proposed amendments do not enable the preparation of neighbourhood environmental improvement plans or environmental agreements which would provide workable and more inclusive alternatives to the EPP process. These instruments can also address issues that are difficult if not impossible to address under the current licensing process.

F42. DEP has on occasions arbitrarily reserved "environmental capacity" or made allowance for anticipated current ambient levels through setting lower emission limits. To further restrict the use of environmental capacity to preserve opportunities for future development is unreasonable in the absence of formal Government policy.

F43. The reservation of environmental capacity for future development is not an environmental protection issue but is primarily an industrial development, commercial or Government economic development policy matter. In specific areas the Government may determine rules for sharing environmental capacity. Any trades or reallocations would require the consent of the regulatory agency to ensure the environment is protected by the transaction.

F44. Environmental offsets are not readily achieved through the current licensing process but are important in achieving cost effective environmental outcomes within a local area.

Recommendations

R37. The Act should be amended to include head powers for neighbourhood environmental improvement plans and environmental agreements. These instruments may be applied where cumulative emissions, multiple sources or limited environmental capacity are an issue to provide a framework for:

- establishing environmental objectives and an action plan;
- community consultation;
- addressing cumulative impacts in accordance with environmental objectives; and
- offsetting and trading.

R38. A formal policy should be developed on sharing of environmental capacity.

R39. A formal policy or guideline should be prepared on environmental offsetting in licensing.

14. EMISSION LIMITS AND AMBIENT STANDARDS IN LICENCES

14.1 DEGREE OF SPECIFICATION IN LICENCES

14.1 Stakeholders expressed varying views on the degree of specification of emission limits in conditions of licence. Stakeholders representing the community tended to support detailed specification of emissions to ensure there is clarity as to the consent being given to the licensee, whereas industry tended to support less prescription and that any prescription should be in accordance with the environmental significance of emissions. Emission limits in licence conditions are seen by all stakeholders as being a clear statement of the extent of the consent for emissions and add to the transparency, certainty and clarity of a licence. Other conditions are seen as less transparent and certain.

14.2 All stakeholders expressed concern about inconsistency of emission limits between licences. Some industry stakeholders feel that DEP has, in some instance, been too responsive to political circumstances or alarmist community opinion in setting onerous limits rather than rational consideration of environmental risk. This was strongly disputed by community stakeholders.

14.3 Some stakeholders representing licensees felt there should be some flexibility in how emission limits are expressed whether this be load, probability or concentration based. The variability, unpredictable nature and the lack of ambient standards or policy foundation or leadership are a profound concern. One community stakeholder group opposed the use of probability based limits but suggested significant emissions should be determined through a tripartite process. The consideration of significance involves many factors including toxicity, environmental context, tendency to accumulate and sensitivity of receptors.

14.4 Some licensees may be worse off with emission limits in licence conditions than they would be otherwise. This is based on the view that having emission limits as conditions introduces another offence (breach of conditions) for which a "reasonable precautions" defence may not be available.

14.5 The National Pollutant Inventory information reveals a vast range of emissions that do not appear as emission limits in licence conditions. Some community stakeholders see this as prima facie evidence of undisclosed emissions that may be significant.

14.6 A question was posed as to whether a licence that does not include conditions that specify emissions provides an open-ended defence against pollution. However, the balance of opinion suggests this is not the case. The Act does not appear to require that emission limits have to be specified and therefore if an emission is not specified in a licence it is not "unlicensed".

14.7 Some stakeholders viewed the use of ambient standards in licence conditions as a means to verify that ambient levels are below accepted standards rather than being an easily enforceable condition. In many cases ambient standards or recognised monitoring methods are not available. The enforcement of ambient standards is often more difficult than emission limits because of the difficulty of establishing a direct link between a source and measured ambient levels.

14.8 Notwithstanding the divergence of opinion, all stakeholders believe that very minor emissions do not need to be specified. All stakeholders generally agreed that licence conditions should concentrate on establishing appropriate emission limits for significant

emissions. The challenge is to provide a transparent and clear process for determining which emissions should be limited by a licence condition.

14.9 The Act does not provide any direct guidance on the extent to which emissions should be specified in a licence.

14.10 The Keating Review presented a recommendation that outcome based conditions should be used in approvals to the greatest extent practicable. The review further recommended that where regulations or legislation prevent this approach they should be changed so that outcome based approvals and conditions can be used.

14.2 EMISSION ALLOCATIONS

14.11 The concepts that apply to the usage of community owned natural resources (analogous to the use of the environment for the receipt of emissions) such as water have relevance to the licensing of discharges from prescribed activities.

14.12 The abstraction of water for commercial purposes, in prescribed areas, may be permitted through a licence provided the abstraction does cause unacceptable impacts on environmental values and other users that are dependent on the water resource. This is analogous to allowing emissions within an area up to a prescribed contaminant load or ambient concentration to protect environmental values. These environmental standards (sustainable yields in the case of water) provide a "lid" or "ceiling" on the usage of the environmental resource.

14.13 It is normal practice in the allocation of water to consumptive use to limit the taking of water to that required for the development. To do otherwise is considered inappropriate as it would deny opportunities to other users or provide an unfair trading advantage or windfall to the licensee. Also only that part of the allocation that is used can be retained over the long term. After a certain period of time unused allocations may be surrendered or traded.

14.14 A similar concept can be applied to emissions specified in licence conditions. Only those significant emissions (see below) that are required for the activity to operate are specified as emission limits in licence conditions.

14.3 SIGNIFICANT EMISSIONS

14.15 The characteristics of significant emissions should be included as licence conditions. However emission limits should not be seen or confused with an emissions inventory for the premises. An emissions inventory may be required by a licence condition and after its preparation the significance of emissions from the premises may be re-evaluated. This re-evaluation may lead to a review of licence conditions.

14.16 The significance of emissions can be assessed using an environmental risk assessment methodology acceptable to community stakeholders, the regulator and the licensee. The following factors are relevant in assessing significance:

- the environmental risk (health and ecological) posed by the emission including community concern;
- approved policies, agreements or local area plans; and
- local ambient levels.

14.17 An emission limit for a significant emission should only be specified in a licence condition where:

- the limit is environmentally acceptable (if the emission is found to be environmentally unacceptable appropriate action would be taken by the CEO to review the licence or restrict the emission to acceptable levels);
- it is feasible to measure the emission;
- reliable techniques are available to measure the emission; and
- compliance with the limit can be supported by an acceptable monitoring protocol.

14.18 Given the uncertainties in the measurement of odour emissions, specification of odour emission limits or ambient odour levels in licences is likely to be inappropriate in most instances.

14.19 The characteristics of fugitive or diffuse sources and emergency emissions cannot be readily characterised through licence conditions. In these cases appropriate ambient standards (quantitative or qualitative) may be set in licence conditions to safeguard against pollution subject to qualifications outlined in 14.7 above. For instance, in Victoria, a qualitative odour condition may be placed on a licence prohibiting the emission of odours that cause offence beyond the boundaries of the premises.

14.4 EMISSION LIMITS AND TARGETS

14.20 DEP may currently set emission limits based on:

- taking all reasonable and practicable measures (opposed by all stakeholders);
- environmental impact (including cumulative in some instances); and
- reserving some environmental capacity for future developments.

The matters are also addressed in Sections 12 and 13.

14.21 DEP has proposed a scheme of emission limits and targets. Emission limits are levels of performance that are never to be exceeded and targets are triggers where some licensee response is required. Targets would not be set as an emission limit in a licence condition but would require improved performance by the licensee. This two-tier approach would not be applied in those situations where ongoing attention to high environmental performance was not warranted. Community stakeholders are concerned that current limits in licences would be converted to targets.

14.22 The derivation of emission limits and targets is seen by DEP as being the result of negotiation between themselves and the licensee. Community stakeholders believe this should be a tripartite process involving community members.

14.23 The setting of targets could also be through the EIP process. The setting of targets though this process is preferred.

Findings summary

F45. The representative for the Chamber of Minerals and Energy on the Stakeholder Reference Group maintained in his submission on the draft Review Report that emission limits should be established on the basis of scientific assessment but recognises that in the absence of specific knowledge it may be appropriate to set limits through a tripartite arrangement

between regulator, industry and the community. Similarly the Chamber of Commerce and Industry indicated that community concerns should be scientifically based. Those stakeholders who provided specific comment on this issue indicated that targets should not be prescribed as emission limits in licence conditions. Emission limits are outcome based and the most important component of a licence as they are clear as to the consent for emissions being given to the licensee. The imposition of operational or maintenance conditions are at best an indication of meeting environmental outcomes. The imposition of outcome based conditions is consistent with the recommendations of the Keating Review.

F46. The Act does not provide any direct guidance on the extent to which emissions from prescribed activities may be specified by licence conditions. The intent of the Act appears not to require specification of emissions except that required by the CEO to administer the licence. Consequently, the extent of emission specification is highly discretionary and a transparent and clear process is required to determine which emission limits are placed in licence conditions.

F47. The Act provides a defence to licensees for pollution and taking reasonable and practicable measures offences. Licence conditions can be used to specify emission limits for all significant emissions under the current Act and more clearly under proposed amendments.

F48. The concepts that apply to the allocation of water may be applied to the use of the environment for receipt of emissions. Only that part of the environmental resource required to support the development may be allocated. Similarly it may be argued that only those significant emissions required for the development should be specified in a licence.

F49. Significance of emissions will vary from place to place depending on a number of factors including the environmental risk (including community input) posed by the emission and local ambient levels of contaminants. The definition of pollution and unreasonable emission suggest that community concerns can be taken into account when determining licence limits.

F50. Emission limits are not an emissions inventory but an inventory may be required by licence and subsequently lead to review of emission limits set by conditions.

F51. DEP favours the setting of emission targets not as emission limits but as a trigger for a management response. A licence condition would specify the response required.

F52. The EIP process can be employed to determine targets (refer Section 12).

Recommendations

R40. Emission limits for significant emissions should be the principle focus of licence conditions as they are outcome based and define what is permitted to be emitted (the emission consent being provided) in a transparent and clear manner.

R41. Significance of emissions should be determined on the basis of inherent and residual environmental risk of emissions which includes consideration of community concern.

R42. Emission limits should not be imposed on diffuse or fugitive sources where it is impracticable to measure the emissions or an appropriate monitoring protocol is not available (as this severely limits enforcement). The application of a condition that restricts the impact or sets an ambient level would be more appropriate in these situations provided a clear relationship can be drawn between the source and ambient levels measured.

R43. The following approach should be followed for specification of emission limits for significant emissions in licence conditions:

- The onus should be on applicants to identify, in licence applications all significant emissions that are likely to arise from prescribed activities on the premises.
- The applicant should demonstrate in the licence/works approval application that the level of environmental risk is acceptable, the waste minimisation principle (taking all reasonable and practicable measures) has been adequately addressed, any community concerns have been identified and addressed and the emissions are consistent with any approved policy.
- Emission limits for significant emissions should be determined on the basis of acceptable environmental risk (determined as appropriate through a tripartite process), emissions required for the development and cumulative impacts.
- An emission limit schedule should be constructed for a licence and this schedule should define the characteristics (including location) of all significant emissions. Emission limits for fugitive or diffuse sources should not be included in the licence where they can not be accurately measured.
- The emission limit schedule should not be considered an emissions inventory.

R44. Reductions in licensed emissions obtained through improvements over time should be surrendered or traded (if not required for future expansion) within a specified time in accordance with an approved policy.

R45. Targets should be developed through the EIP process and should not be specified as limits in licence conditions (refer Section 12).

15. REVIEW AND TERM OF LICENCES

15.1. Legal advice to DEP indicates that a term of a licence is not a condition and consequently is not appealable under the current Act (and proposed amendments). Under the current Act licences may be issued for any period but have been issued more frequently because of inability to impose an annual fee unless the licence is renewed. This situation has been remedied by the proposed amendments to the Act.

15.2. Community stakeholders believe the term should be appealable and the term of all licences should be limited, whereas stakeholders representing licensees would prefer longer-term licences to provide for security of operation and investment. Licences may be reviewed when there is question of lack of performance. Community stakeholders see the renewal of the licence as an opportunity to raise issues of environmental improvement or to protest about the unacceptable nature of emissions. One stakeholder was also concerned that the basis on which the CEO may amend conditions (for instance following a licence review) could be limited.

15.3. Stakeholders representing licensees were concerned that limiting the term of licence may affect investment because of the lack of security with a short-term licence.

15.4. The current system of annual renewal has created frequent opportunities for appeal and has increased the licensing workload for DEP.

15.5. In NSW and Victoria licences are not issued for limited periods and may only be revoked upon the request of the licensee or as a result of an enforcement action by the regulator. In NSW all licences are subject to a triennial review.

15.6. There is very little justification for limiting the term of a licence particularly:

- as polluting discharges should not be licensed;
- if the work which is the subject of the licence has been constructed in accordance with the conditions of a works approval or implemented in accordance with a Part IV approval;
- if the licensee is committed to an EIP process where there is a high level of community interest;
- as the Act enables the CEO to suspend or revoke the licence at any time for a breach of conditions and misleading or faulty information in an application; and
- as the proposed amendments to the Act allow the CEO to amend the licence at any time.

15.7. All licences could be subject to review within a reasonable period of time as determined by the CEO. Under the proposed amendments, conditions could be imposed in this regard. The timing of review would depend upon whether:

- The licensee is subject to an EIP (reviews would not be required if this process is proceeding satisfactorily).
- Substantial community concerns have to be addressed.
- There have been substantial changes in policy.
- There have adverse findings from an independent audit.
- There is substantial non-compliance.

15.8. The Conservation Council and Environmental Defenders Office in their submission on the draft Review Report maintain that if short term licences are to be abolished then the CEO

should be given additional powers to revoke or suspend a licence if it becomes clear that the licensed activity is or will become environmentally unacceptable. This argument is based on the premise that the proposed S59A amendment to the Act is limited to breach of conditions or false information.

15.9. The extension of CEO powers to revoke or suspend a licence if the licensed activity is environmentally unacceptable raises a number of issues about definition of unacceptable impacts and the uncertainty that this causes. There are other powers under the Act – environmental protection notices and directions - that are more appropriate and can immediately redress issues of environmental unacceptability or environmental harm.

15.10. The licence review process should be transparent and provide an opportunity for stakeholder involvement. A review procedure should be developed based on the Act.

15.11. The Conservation Council and Environmental Defenders Office suggest that any proposed amendments to the licence proposed by the CEO should be advertised and the community provided with an opportunity to comment. Similarly comments were received from the Water Corporation that similar procedures should be followed in cases where more stringent limits are imposed by the CEO pursuant to S60 3(a) than those required by prescribed standards or policy (refer Section 20.1 of this report).

Findings summary

DEP, the representative for the Eastern Metropolitan Regional Council on the Stakeholder Reference Group and the Chamber of Commerce and Industry agreed with the findings and recommendations in the draft Review Report on this issue. The Conservation Council and Environmental Defenders office wish to extend the power of the CEO to revoke or suspend licences if short term licences are abolished.

F53. Under the current Act licences have been issued on a short-term basis principally because of the inability to charge an annual fee for a long-term licence. The proposed amendments to the Act apparently remove this problem.

F54. The annual renewal of licences has led to an increased workload for DEP and more opportunities for appeals. The reduced opportunity for appeals is of concern to some community stakeholders.

F55. There is little justification for short-term licences where the licensee is complying with works approval and Part IV conditions. The CEO has the power to amend the licence at any time. This loss of appeal opportunities is of concern to some community stakeholders.

Recommendations

R46. Licences should not be issued for a short-term unless the life of the development is limited given the CEO power to amend the licence pursuant to S59A and S60 3(a).

R47. Any amendments to the licence proposed by the CEO should be subject to the same advertising and consultation requirements as applications for amendment to a licence by licensees.

R48. Licences should be subject to review in response to a high level of community concern, changed receiving environment, new environmental information or policy circumstances.

R49. DEP should prepare a detailed administrative procedure for the triggering and review process for licences and CEO initiated amendments to licences in consultation with stakeholders.

16. ENFORCEMENT

16.1. Enforcement policy is being considered under a separate review by Dr Brian Robinson. However, there are two aspects of enforcement that are relevant to this current review:

- The enforcement approach can affect the extent to which licensees may pursue environmental improvement; and
- The degree to which improvement is specified in licence conditions can affect the extent to which a licensee may commit to progressive environmental improvement.

16.2. The enforceability of licence conditions is influenced by a number of factors including whether the power to impose the condition is available under the Act and whether the occupier and premises has been correctly identified in the licence. The enforceability of conditions is enhanced through a standard approach to the drafting of conditions and an unambiguous statement of the requirement of the condition.

16.3. The Conservation Council and the Environmental Defenders Office in their submission on the draft Review Report indicate that the enforceability of many conditions is reduced by discretionary or ambiguous elements - for instance the words "reasonable and practicable". They support the recommendation that guidelines for legally enforceable conditions should be prepared and add that all licence conditions be reviewed and that model licence conditions should be prepared.

16.4. Enforcement needs to reinforce the need to identify what is required of the licensee but not discourage those who wish to go further than compliance. Those who commit to work with the community and go further than licence limits should be able to so without the potential for being prosecuted for a breach of licence if such targets are not met.

16.5. New mechanisms, possibly civil rather than criminal sanctions, may be appropriate for breach of targets. There is a potential for environmental agreements (being a contract) to be tailored for these situations in EIPs and such agreements could be issued together with a licence.

Findings summary

F56. Guidelines are required for drafting of legally enforceable conditions.

F57. The approach to the enforcement of targets based on doing better than emission limits will influence the extent to which licensees will commit to environmental improvements. New legislative mechanisms (agreements) may be required to encourage licensees to innovate.

Recommendations

R50. DEP should prepare guidelines for the drafting of legally enforceable conditions and prepare model conditions for comment by stakeholders.

R51. The enforcement policy should not discourage licensees to do better than statutory limits.

R52. Environmental agreements should be considered as an alternate mechanism for implementation of voluntary targets and environmental improvements.

17. CONTENT OF CONDITIONS

17.1 INCONSISTENCY

17.1. All stakeholders were critical of inconsistencies in the conditions and emission limits applied to different premises. The stakeholders representing licensees were particularly critical of inconsistencies. These inconsistencies occurred in a number of ways:

- Between Ministerial statements and works approvals and licences.
- Premises operating in the same geographical region or catchment frequently have very different limits while discharging to the same receiving environment.
- A variety of ways in which throughput is expressed.
- Conditions applied to separate operations managed by the same organisation in similar environments are often different.
- Conditions vary from year to year according to the DEP officer issuing the license.
- Variable time provided to review proposed changes to licences.

17.2. Community stakeholders were concerned that some licences specify emission limits for parameters in some cases but in others the limits are excluded even though the same process is involved.

17.3. An example was given of a waste to energy facility which had much more stringent discharge limits placed on it than proposed fossil fuel energy generation facilities and massively more stringent limits than existing fossil fuel energy generation facilities. This discourages renewable energy generation proposals, encourages conventional non-renewable generation proposals and prolongs the viability of existing highly emitting sources – all undesirable environmental outcomes.

17.4. Environmental risk may vary from location to location depending on the environmental characteristics, community concern and environmental sensitivities at each location. This may mean that for the same activity emissions prescribed in the licence may vary. Currently there is no specified methodology or process for determining those emissions that are significant (refer Section 14).

17.5. Earlier recommendations for the publication of reasons for decision or assessment report together with a methodology for determining significant emissions would add transparency and clarity to the determination and promote a consistent process for specification of emission limits and licence conditions.

17.2 PREAMBLES AND "CONTEXT STATEMENTS"

17.6. Almost all stakeholders were critical of the use of preambles and were concerned as to the legal standing of wording in italics in licence conditions. The use of preambles and italicised licence condition "context statements" created uncertainty for all stakeholders as to whether these were enforceable or legally binding.

17.7. DEP indicated that the preamble and the italicised context within conditions may help to tie the condition to the relevant section of the Act and therefore become more enforceable. DEP in its submission on the draft Review Report indicated that throughput conditions are being removed from licence except where they are a legitimate approach to controlling emissions.

17.3 UNREASONABLE OR ARBITRARY CONDITIONS

17.8. One stakeholder was concerned by the presumption by DEP that waste should not be discharged to streams notwithstanding that such discharges may be environmentally acceptable. This leads to allocation of funds away from areas where better environmental outcomes can be achieved and may unreasonably constrain the types of works that may be employed at a location.

17.9. Some laboratory standards prescribed in licence conditions could not be conducted by any laboratory in Australia.

17.10. The imposition of process throughput limits on licences is viewed by many as being legally questionable, does not encourage environmental efficiencies and is at best remotely related to environmental risk.

17.11. The current licensing process is seen by some stakeholders as allowing almost unfettered discretion by the licensing officer as to which parameters are licensed and the limits applied to those parameters. At times the licence conditions set by officers go beyond licensing emissions attempting to control the way a business manages its environmental management system. The scope of a licence should be clearly defined and applied consistently across all licensed premises.

17.12. Refer also to Section 12 for discussion on taking reasonable and practicable measures.

17.4 AMBIENT MONITORING

17.13. An occupier can be required to undertake ambient monitoring under the current Act. Many stakeholders representing licensees complained of unnecessary monitoring. An "omnibus approach" without regard to the environmental risk or impact posed by the emission.

17.14. The role of ambient monitoring in the administration of a licence requires clarification. Total reliance on ambient standards instead of emission limits creates difficulties of enforcement and uncertainty in the emissions that may be permitted from the facility. Some stakeholders see the setting of an ambient standard as allowing "pollution up to the line".

17.15. The setting of an ambient standard may not be feasible as monitoring methods may not be available. There is also a fear that arbitrary ambient standards may be applied to preserve some environmental allocation for future development.

17.16. Where specification of an emission limit for a significant emission is not feasible (for instance odour or dust from a fugitive or diffuse source) an ambient standard in a licence condition may be appropriate.

Findings summary

The Chamber of Commerce and Industry and the representative of the eastern Metropolitan Regional Council on the Stakeholder Reference Group agreed with all recommendations on this issue presented in the draft Review Report. DEP indicated that the recommendations would be considered in the review of emission limit condition setting policy.

F58. All stakeholders complain about consistency in emission limits and conditions applied in licences. The types of inconsistencies vary widely. Inconsistent and arbitrary conditions are

more likely to arise from the imposition of the requirement to "take all reasonable and practicable measures".

F59. Preamble and contextual statements in licences create confusion amongst all stakeholders as to their enforceability. Throughput conditions at best reflect in gross terms emissions from the premises and may be legally challengeable under the existing Act.

F60. Ambient standards have a lesser role in licences than the setting of emission limits except where an emission limit cannot be specified for a significant emission and a clear relationship can be established between the source and measured ambient levels.

F61. Recommendations in Section 14 should substantially address issues of inconsistency and arbitrary imposition or determination of emission limits.

Recommendations

R53. Throughput should not be inserted into licence conditions but may be used to describe the scale of the prescribed activity.

R54. Ambient standards should only be placed in licence conditions for significant emissions for which emission limits cannot be accurately specified or measured and a clear relationship can be established between the source and measured ambient levels.

R55. Ambient monitoring should only be required for:

- an ambient limit specified in a licence condition; or
- a special program of investigation is required to determine environmental risk; or
- cumulative emissions of concern; or
- situations where environmental capacity is limited or exceeded; or
- a formal emission trading or offsetting scheme is in place.

18. DEP CAPABILITY

18.1. Some stakeholders representing licensees believed that DEP staff lacked competence and as a result were prone to blindly apply guidelines or informal policies. Officers who assess licence applications and develop licence conditions should obtain a minimum level of accreditation.

18.2. Inadequate consideration of the environmental risk of licensed versus unlicensed premises leads to inequitable requirements on licensed premises.

18.3. DEP are currently assessing the training needs and required capabilities of DEP officers involved in licensing and developing a licensing manual.

18.4. There are also seen to be inconsistencies between officers in the assessment of licences.

18.5. A crude comparison between the licensing load in Western Australia and NSW and Victoria can be made on a per capita basis. DEP currently administers 900 licences and 1300 registered premises. The number administered by the Victorian and NSW EPAs is 1300 and 3000 respectively - an average of 390 licences per one million people over the two States. On this basis WA should be administering about 740 licences. However, taking into account the relatively smaller manufacturing industry base in WA and the management of registered premises, the number of licensed premises could be reasonably reduced to less than 500.

18.6. A preliminary comparison of the resourcing of the pollution regulation or management function may be derived from the expenditures of the States on this function. The total expenditure for the NSW and Victorian EPAs in 2001/2002 was $96 m and $44 m. This is about $32,000/licence or $12.70 per capita (using total persons counted in the 2001 census) over the two States, however it should be understood that most expenditure is not on the licensing process but other pollution management functions). These EPAs are involved in pollution management and are not responsible for conducting impact assessments (performed in other departments) and are therefore not readily comparable with the total DEP expenditure in WA. DEP supports other functions in addition to pollution management including waste management and environmental impact assessment. The expenditure by DEP in 2001/2002 was about $6m on pollution regulation with about $6m on environmental systems, a large proportion of which was related to air and water quality issues. If it is conservatively assumed that a total of $12m was spent on the pollution management function, the expenditure on pollution management is about $13,300 per licence or $6.30 per capita.

18.7. The above preliminary comparisons would suggest that:

- the number of licensed premises is excessive; and
- the pollution function on a per capita basis appears to be under funded.

18.8. The current licensing workload is onerous and results from a combination of the following:

- the large number of licences being administered;
- management of registered premises system;
- lack of resources;
- the need for annual or short term renewal which in turn has led to the temptation to review the licences and more responses to appeals; and

- community lack of confidence in the licensing process in a number of instances.

18.9. The workload and lack of resources has meant poor training of staff, an inadequate policy and procedural framework which in turn has led to inconsistencies and a degree of arbitrariness in the administration of the licensing system. This in turn makes enforcement and auditing of conditions more difficult.

18.10. The implementation of the findings from this review and of the enforcement policy review will add to the current workload and potentially require departmental restructuring.

Findings summary

Those stakeholders who provided comment on this issue universally supported the findings and recommendations in the draft Review Report.

F62. The current resources available to effectively administer the licensing system and develop a policy and procedural framework are inadequate.

F63. The development of an appropriate policy and procedural framework will enable more consistent decisions to be made by officers.

F64. A comprehensive training program to enhance the capability of DEP officers has yet to be developed. The current capability of DEP officers is not held in high regard by many stakeholders.

F65. The move to long term or perpetual licences will reduce the licensing workload.

F66. The implementation of the outcomes of this review will require substantial resources and commitment and potentially some restructuring within DEWCP.

Recommendations

R56. The current prescribed premises schedule should be reviewed to reduce the number of prescribed premise to those that pose substantial ongoing environmental risk and determine where other mechanisms under the Act should be used to protect the environment.

R57. The resourcing of DEP should be reviewed to ensure adequate resources are available to manage the pollution management function.

R58. Reduce the number of registered premises or consider delegation of registered premises to local government authorities.

R59. A comprehensive training program should be developed for DEP officers that involves exchange schemes with consultancies and enhanced competency in community consultation and negotiated outcomes with a view to achieving a prescribed level of competency.

R60. The appointment of a specific task force should be considered to implement the outcomes of this review and the review of enforcement policy.

19. ENVIRONMENTAL RISK

19.1. Most stakeholders see environmental risk as one of the most important considerations in the assessment of licence application.

19.2. The environmental risk assessment approach is a well-recognised and widely applied methodology that can be used for determining the environmental significance of prescribed activities or emissions. Environmental risk assessment is not necessarily a quantitative risk assessment (as is a human fatality risk assessment) but more often a qualitative assessment that may be applied to provide a process for determining the environmental significance of emissions. Licensees with sophisticated environmental management systems conduct these assessments routinely.

19.3. An environmental risk assessment should take into account community concerns and should be based on the following:

- the best scientific data available;
- recognised environmental standards; and
- consideration of uncertainties in emission data, knowledge of the receiving environment and the forecasting of environmental impact.

19.4. More specifically the risk assessment can be used to decide:

- whether a type of facility should be a prescribed activity for licensing or managed through a combination of regulations and environmental protection notices;
- whether an emission is significant and should be limited and controlled through licence conditions;
- the extent of the monitoring program (if any) required; and
- whether an improvement plan or performance audit may be required.

19.5. The risk assessment procedure to be applied should be simple to use, easily accommodated into existing environmental management and regulatory systems and have been shown to be useful through case studies and consultation with stakeholders.

19.6. Environmental risk has the following forms both of which need to be considered in a risk assessment:

- Inherent environmental risk - risk before controls (equipment, process and procedural) are applied.
- Residual environmental risk – risk remaining after the imposition of controls.

19.7. The level of environmental risk arising from an emission is based on an assessment of the following risk factors:

- Scale of the environmental hazard/event (emissions) and is dependent on the scale, characteristics and duration of the emission.
- Likelihood of the event and is dependence on the reliability of controls that may be applied to the emission, operation of the facility and variation in environmental conditions.

- Consequences of the event occurring and is dependent on sensitivity and characteristics of the receiving environment. Consequences include human and ecological consequences and level of community concern.

These above risk factors may be given a numerical or qualitative value and used to calculate a risk level through a risk matrix.

Example -Qenos

19.8. An environmental risk assessment scheme was applied in developing an agreed EIP at a facility (operated by Qenos) in Altona (a Melbourne industrial suburb) using likelihood, environmental impact consequence and public disruption tables, a risk reduction matrix and a priority action table as a basis for environmental improvement (refer Figures 3 and Tables 2 to 6). These were all developed through a tripartite process involving the community, the licensee and the regulator.

19.9. The procedures provide a mechanism to compare the relative importance of making changes in many different areas affecting the environment. This assists greatly in ensuring that investment and effort to improve environmental performance are directed at issues with the greatest environmental impact and community interest.

Findings summary

The use of environmental risk as a key tool to determine emission limits was supported by DEP and stakeholders that made specific comments on this issue. The Chamber of Commerce and Industry indicated that improvement targets are likely to be more associated with waste minimization, corporate social responsibility and community concern.

F67. Environmental risk assessment methodology provides a rational, clear and transparent process for the assessment of environmental significance of emissions and activities and setting of emission limits. This approach can incorporate community concern and has been applied in a "tripartite" process for agreed environmental targets through the EIP process in Victoria.

Recommendations

R61. The environmental risk assessment process should be central to the assessment of emissions, setting of emission limits and the development of environmental improvement targets.

Table 2 Likelihood Table

A	Repeated (eg more than once/year)
B	Isolated (eg once in 1 – 10 years)
C	May occur (eg once in 10 – 100 years)
D	Not likely (eg once in 100 – 1000 years)
E	Very rare (eg less than once per 1000 years)

Table 3 Environmental Impact Consequence Table

Category	Impact	Examples
I	Major/large impact or long duration	Multi-suburb odour/gas release Major offsite pipeline leak Major Cherry Lake or Truganina Swamp pollution
II	Serious or significant impact	Wastewater diverted to Cherry Creek Major pollution to offsite stormwater system Extended major offspec wastewater to CWW Offsite soil/groundwater pollution Major flare smoke for more than 10 minutes
III	Moderate or small impact or short duration	Offspec wastewater to CWW Minor pollution to offsite stormwater system, typically recoverable from drain Major soil/groundwater pollution onsite Major flare smoke for less than 10 minutes, or minor smoke for several hours
IV	Little or no Impact	Typically contained onsite

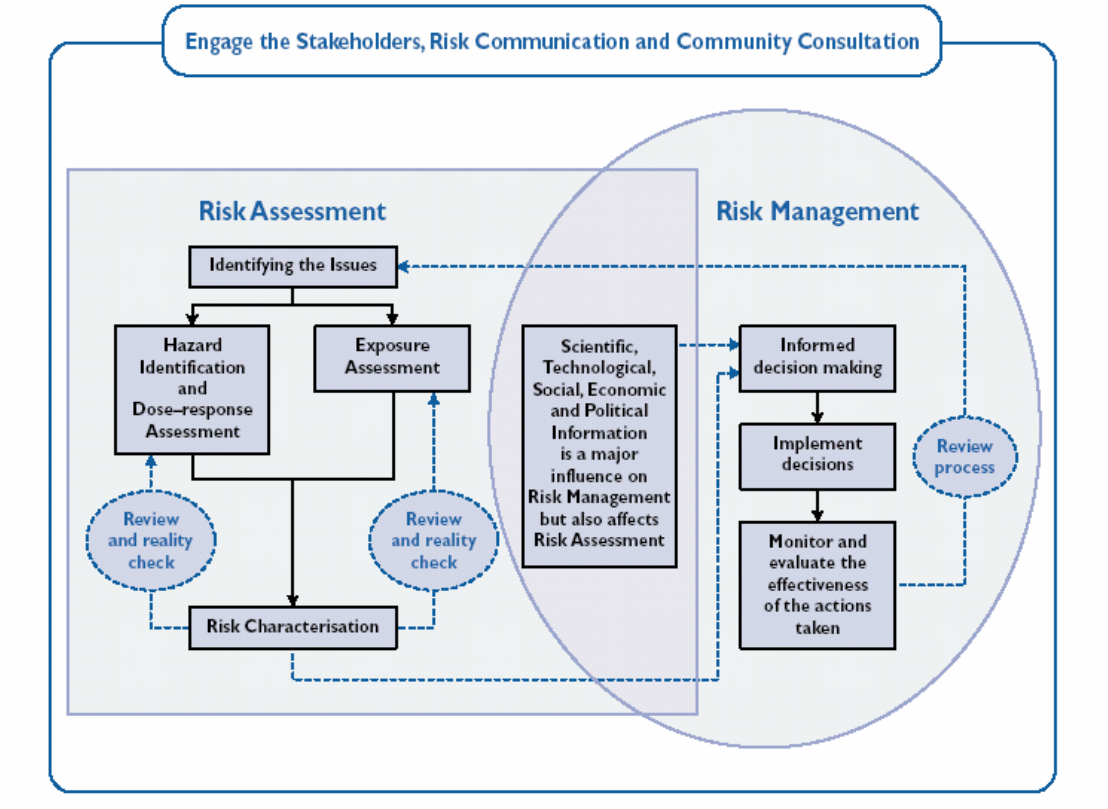

Figure 3 Environmental Risk Assessment

Table 4 Public disruption consequence table

Category	Impact	Examples
I	Larger Community Beyond Altona	>100 complaints
II	Nearby Community/Industry Within Altona	10 – 100 complaints
III	Closest Community/Industry	1 – 10 complaints
IV	Within Qenos	1 internal complaint

Table 5 Risk Reduction Action Priority Matrix

	LIKELIHOOD				
CONSEQUENCE	**A**	**B**	**C**	**D**	**E**
I	1	1	3	5	7
II	1	3	3	5	7
III	3	5	5	7	7
IV	5	7	7	7	7

Table 6 Action implementation table

RISK PRIORITY LEVELS	MAXIMUM TIME FOR IMPLEMENTATION
1	end of next working year
3	within next 5 working years
5	within next 10 working years
7	not required - manage risk as is

20. ADDITIONAL ISSUES RAISED IN SUBMISSIONS/BRIEFINGS

Some submissions raised additional issues that have not been addressed under the key issues addressed above. The full text of comments on these issues is provided in Appendix 1.

20.1 MOVING GOAL POSTS

20.1. The Water Corporation in its submission expressed concern about the powers provided under the Act (S603(a)) for the CEO to impose standards that are more stringent than prescribed standards and policies. This issue is most contentious as it leads to a perception of "moving the goalposts". The Corporation is concerned that this discretion should at the very least be subject to open and accountable review before being put into effect.

20.2. Earlier recommendations in this report suggest that any CEO initiated amendment to the licence should go through the some process as that of an application for amendment by a licensee. Under these recommendations the CEO would have to prepare a report describing the reasons and basis for the decision to amend the licence and subject the amendment to a period of public and licensee review. Instruments such as PANs or direction more appropriately redress polluting emissions.

20.2 MATTERS TO BE CONSIDERED WHEN SETTING CONDITIONS

20.3. The Water Corporation provided seven principals that need to be addressed in setting of a licence condition:

- Where conditions are being considered, firstly determine whether there is an environmental issue that needs to be controlled/managed.
- Any condition envisaged should have a basis at law.
- Compliance with the condition is attainable.
- The condition to be imposed is reasonable and practicable.
- The condition should be enforceable.
- Performance (comply/non-comply) should be measurable.
- The instrument should have Parity and Equity in approach.

The full text of on these principles is provided in Appendix 1

20.4. These principles should be considered by DEP in the development of its licensing procedures.

20.3 HIGH PRIORITY FOR IMPLEMENTATION

20.5. The Chamber of Commerce and Industry in its submission indicated that there are a number of recommendations that it considers should be implemented as a priority, These include:

- Conversion of all licences to perpetual licences with annual fees (R43, R44 – Now R46 and 48),
- R1-5 (now R1, R3, R4, R6 & R7) and R19-R21 (now R22, R23) which relate to concurrent assessment or availability of licence conditions during the Part IV process

and the need for consistency between conditions and approvals under Part IV and Part V.

- R37-40 (now R40-43), R49-50 (now R54, R55) and R53 (now R61) relating to determination and basis for setting emission limits, use of ambient limits and monitoring in licence conditions and the environmental risk assessment being the basis for determining emission limits, conditions and improvements.
- R48 (now R53) eliminating throughput from conditions.
- R52 (now R59) relating to training of DEP staff.
- R9, R15, R16 and R34 (now R11, R18, R19, R36) relating to development of policies guidelines and procedures.

20.6. The review presents 61 specific recommendations all of which are important in achieving an effective system for licensing in Western Australia. The vast majority of these recommended actions can be quickly initiated and addressed concurrently. Some of the more critical recommendations in the short term are those relating to (in no particular order):

- Preparation of licensing procedures to address stakeholder involvement, transparency and certainty, CEO and licensee initiated amendments and application of environmental risk assessment in the administration of the licence process.
- Development of formal policies in conjunction with stakeholders to provide a sustainable framework for the control of pollution and emissions.
- Acceptance that there are other more effective means to abate pollution than licences.
- Coordination and concurrent Part IV and Part V approval processes.
- As licence renewals arise converting them to perpetual or long term.
- Rationalisation of workload through reducing the number of licences and registrations administered by DEP.
- Creation of enhanced capabilities of DEP staff.
- Increased resources for DEP.

In the medium term but no less important, those recommendations relating to:

- Amendments to the Act for neighbourhood improvement plans, environmental agreements, removal of the general offence to take all reasonable and practicable measures.
- Rationalisation of environmental approvals and decision makers through a review of the Act.

21. RECOMMENDED MODEL LICENCE

21.1 LICENCE STRUCTURE

21.1. The structure of a model licence would be basically divided into nine sections as follows:

1. Section 1 –Cover page – Description of prescribed premises and activities and licensee
   - Licensee, premises address, prescribed activities, licence number, date of issue amendments dates, term.
2. Section 2 – Index to licence
3. Section 3 – Definition of terms used in the licence
4. Section 4 – Emissions and ambient limits schedule
   - Emission limits, ambient limits and location of emission points and ambient monitors for ambient limit (tabulated and shown on map).
5. Section 5 – Environmental management plans and operational controls
   - Operational controls, maintenance requirements and management plans – Only if required.
6. Section 6 – Performance monitoring and reporting
   - Monitoring, auditing, investigations and reporting.
7. Section 7 - Environmental improvement plan (optional)
8. Section 8 – Severance
9. Section 9 – Plan of premises

21.2. Key sections are addressed below.

Emission and ambient limits schedule

21.3. This section specifies the details of emission limits, ambient limits and location for significant emissions and points where ambient limits are to be met. Each limit would have an associated monitoring method. Some sampling methods may involve a measurement over a short time period. Where emissions have a substantial potential to pollute, a continuous monitoring method may be specified.

Environmental Management Plan and Operational Controls

21.4. This section focuses on actions required by the occupier to prevent pollution and to meet any specified ambient standards (qualitative or quantitative). These types of requirements tend to be incorporated into conditions where specifying emission limits is impractical, unwarranted or inappropriate.

21.5. For relatively straightforward situations (spills, fugitive dust emissions and noise) conditions specifying operational control or management measures (in accordance with a management plan submitted with the licence application) may be regarded as good/normal practice.

21.6. Conditions that attempt to prescribe requirements for complex operational situations such as the operation of pollution control equipment in a certain manner in atypical circumstances where discharge limits have not been specified (eg responses in the event of partial ESP or water treatment plant malfunction) should be avoided. The regulator rarely has the level of knowledge required to effectively describe what should be done. If the emission has the

potential to pollute, it should be dealt with by specifying ambient limits and a monitoring program or through the implementation of environmental management procedures or detailed plans.

21.7. In both of the situations above, it is preferable to use management plans prepared by the occupier to meet the occupier's operational obligations, rather than prescriptive licence conditions. The prescription of operation controls in conditions should be limited to rare circumstances where the requirement is considered to be particularly important.

21.8. It should be remembered that operational conditions whether specified in a licence or through a management plan are difficult to enforce. The key to enforcement is to set up audit trails. Paradoxically, while the DEP promotes "audited self-management" by industry, conditions are not well focussed towards auditability.

21.9. Moving operational requirements towards an EMP format allows more comprehensive requirements to be specified, and more flexibility, outside the more rigid prescriptive licence condition format. DEP should develop a guideline for the content of EMPs with a focus on auditability.

21.10. If an operational condition is warranted (rather than an EMP):

- a corresponding record keeping requirement should always be specified to at least create an audit trail; and
- the record should be important enough to warrant provision to the DEP (not simply "available for inspection").

21.11. In terms of operational condition structure, this section of the conditions should specify:

- the operational (ie action) requirement to prevent pollution; then
- the recording keeping requirement (eg electronic data, a logbook etc).

The "record" can then be referred to in reporting conditions (in the Performance Monitoring and Reporting section) which specify how often information is to be submitted to DEP.

21.12. As far as possible, operational conditions should be ordered as per the sequence of processing undertaken on the premises.

21.13. Operational practices often relate to preventing air, water and/or other forms of pollution simultaneously. It is not necessary to put each condition under an "air", "water" or other heading. This type of splitting of requirements leads to poorly structured conditions increasing the likelihood of duplication and inconsistencies.

Performance/compliance monitoring and reporting

21.14. This section deals with:

- the monitoring required to demonstrate compliance with emission limits and ambient standards;
- monitoring or other forms of estimating emissions that are not limited; and
- the reporting of results.

21.15. Emission monitoring information collected through licence conditions should be integrated with the NPI reporting requirements.

21.16. Pollution may occur on shorter timescales than annualised emissions. The measurement of emissions needs to be consistent with the timescales relevant to potential pollution or environmental risk.

21.17. DEP should develop:

- a consistent approach to specifying discharge sampling and monitoring methods; and
- generic emissions sampling and monitoring guidelines which references appropriate default methods (as per EPA Victoria's Publication 440 "A Guide to the Sampling and Analysis of Air Emissions").

Default methods may, however, not always be applicable in specific circumstances and the DEP should allow occupiers to propose alternative methods. If these are accepted by the DEP, they need to be documented in a form that is easily referenced in the licence conditions (such as being within the EMP).

21.18. DEP should develop generic reporting guidelines for sampling/monitoring results (particularly where they are in electronic form) to facilitate the DEP's assessment. Default requirements may not always be applicable in specific circumstances and the DEP should allow occupiers to propose alternative approaches which are subsequently documented.

Environmental improvement plans

21.19. The EIP has two basic aims:

- Voluntarily reducing significant emissions in line with community concern and environmental risk; and
- monitoring/researching problems to improve the understanding of the impact of significant emissions.

21.2 TYPES OF CONDITIONS

21.20. The review of stakeholder input, current local and interstate practices and contemporary approaches to environmental protection have revealed there are a number of types of conditions that may be imposed on licences. Each of these conditions has strengths and weakness and their applicability will vary in each situation (refer Table 7).

Table 7 Application of conditions

Condition type	Pros	Cons	Proposed application
Preamble and other "context statements"	Provides an explanation of licence context. DEP suggests they may assist enforceability.	Creates uncertainty amongst community stakeholders and licensees. Lack of clarity of licence requirements.	Do not include in licence condition. Keep licence uncluttered. Place in description of activity and DEP licence assessment report.
Emission limits	Easily verified/enforceable and outcome based. Enables emissions trading offsetting.	One step removed from actual receiving environment outcome.	All significant emissions to be described but not those emissions resulting from plant upsets as these may be polluting.

Condition type	Pros	Cons	Proposed application
Ambient limits	Focussed on environmental outcomes. Lower ongoing administrative effort.	Difficult to identify source and enforce compliance. Not readily adapted to emissions trading. Greater continuous ambient monitoring required.	May be used to prescribe an environmental limit for diffuse or fugitive sources assuming a clear relationship can be established between source and measured levels. Would not normally be used as a licence condition where a significant emission can be quantified and measured.
Detailed prescription of emission limits	Prescribe more exactly extent of discharge consent. More closely defines defence for action for pollution.	Increased administrative effort. Increased chance of technical breaches. Breach of limit may not result in pollution. Limited defence for breach of condition.	All significant emissions to be prescribed in conditions where emissions can be reliably measured.
Process throughput	Readily determined by licensee.	Difficult to independently verify. Does not focus on environmental or emission outcome. May be disconnected from environmental outcome.	Do not include in licence condition but may be included as part of the description of the activity to which the licence applies in accordance with Part IV or works approval and DEP assessment report.
Prescriptive design conditions	Can be verified through audit. Readily understood.	Not outcome based and less focussed on environmental outcome. Does not guarantee achievement of environmental outcomes. Increased administrative effort and capability of DEP required.	Avoid prescribing design in conditions but may be considered for key pollution control equipment.
Operational conditions (shutdown etc) and management plans	A lesser control substitute where emissions monitoring is not practicable.	Can reduce licensee flexibility. Less enforceable or auditable than measurement of emission or design conditions.	Operational conditions or management plans may be developed for housekeeping, shutdown, where significant emissions are not prescribed. Operational issues should be largely incorporated into an EMP.
Best practice or reasonable and practicable emission limits	Reduces risk from uncertainty in environmental impacts etc. Refer section 12.	Somewhat arbitrary and potential higher costs to industry and subject to high community scepticism.	Applicant to demonstrate consistency with waste minimisation principle in accordance with approved policy. Existing licensees to promote improvement through voluntary EIP.
Ambient monitoring	Verifies environmental outcome	Can be costly and may be difficult to ascertain source contributions and pursue enforcement action on the basis of results. One step removed from the source.	Apply where ambient levels are approaching carrying capacity due to contributions from a number of sources, where emission limits are not practicable and emission could result in pollution or to adaptively manage emissions in accordance with EMP.
Continuous in stack/pipe monitoring.	Provides ongoing assessment of compliance and performance.	Potentially less accurate than spot sampling/laboratory analyses. Higher cost to industry and is not feasible for many contaminants.	Apply where feasible where process is variable, emissions control systems are relied upon to prevent substantial pollution and assessment of ongoing compliance is important. Short campaigns occasionally may be appropriate to verify behaviour of process or allow surrogate measures of emissions.

Condition type	Pros	Cons	Proposed application
Occasional stack tests	More accurate and may be applied to a large number of substances. Provides indication of compliance at time of testing.	Provides a snapshot and not ongoing assessment of compliance or performance.	Apply where assessment of compliance is important and process variability is small.
Specification of monitoring and sampling standards	Provides confidence in quality of results if the appropriate method is specified. Enables better enforcement.	Reduces flexibility in approaches that may be applied. Requires knowledge of the appropriate method by regulator. Limits persons who may be able to perform to standard.	Apply where any monitoring is required. Need to discuss with stakeholders before finalising specification.

APPENDIX 1

STRATEGIC REVIEW OF WESTERN AUSTRALIAN LICENCE CONDITIONS

SUBMISSIONS RECEIVED

STRATEGIC REVIEW OF WESTERN AUSTRALIAN LICENCE CONDITIONS

SUBMISSIONS RECEIVED

PREPARED FOR

DEPARTMENT OF ENVIRONMENT WATER AND CATCHMENT PROTECTION

BY

WELKER ENVIRONMENTAL CONSULTANCY

FEBRUARY 2003

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1. OVERALL COMMENTS ON ADEQUACY OF THE REVIEW

Chamber of Commerce and Industry

The Chamber of Commerce & Industry supports the review of license conditions and will work with DEWCP to facilitate implementation of the recommendations. However, we are very concerned about the capacity of DEWCP to implement the changes given their current level of resourcing. A number of our members have noted that many of the existing issues within DEWCP are a result of inadequate resources in terms of skill, training, expertise and experience of staff. If these recommendations are to be seriously adopted then the resources allocated for implementation need to be carefully considered.

Conservation Council of WA & Environmental Defenders Office WA

We support the objective of this Review, which is to assess the licensing system used by the Department of Environmental Protection (DEP) and to make recommendations to address any problems identified. We congratulate the consultant on the comprehensive and incisive document produced within a very short timeframe. In view of recent events, and also in view of the Government's commitment to sustainability, we consider it vital not to rush the process or limit its outcomes. To this end we would like to see an extension of the contract to take the review further and to produce, after thorough consultation, an innovative system that reflects Western Australian conditions.

This should be done, not just in the context of Australian developments, where other States have not progressed far in thinking about sustainability, but to also consider overseas attempts to move beyond simple 'command and control'. In this way we will ensure that changes to environmental regulation, in particular a new licensing system reflect other changes towards a more sustainable society.

Contaminated Sites Alliance

The Contaminated Sites Alliance welcomes the opportunity to comment on this review of licence conditions in Western Australia. It has long been the view of our organisation that licences had been the weakest link in the chain of environmental regulation of industry.

While licences such as they exist today may have been adequate for end of pipe regulation common in the 1970's, they have becoming increasingly redundant in an era where the focus has moved to ecologically sustainable development.

The Alliance is of the view that licences should be the statutory instrument by which it is possible for Government (and the community), through regulatory agencies to hold industry legally accountable for environmental impacts, specify emission limits and move industrial practices toward a more ecologically sustainable footing.

As recent events have demonstrated, a number of waste management facilities and 'smokestack' industries in Western Australia have been in serious breach of licence conditions yet little or no action had been taken to rectify the problems at the sites until major pollution events resulted. To some extent, legally unenforceable licences have exacerbated these problems.

The public has lost confidence in the ability of regulators to control industrial emissions and activities leading to contamination. A key aspect of this loss of confidence stems from a belief that the environmental regulators are unwilling to confront industries with a poor environmental record and enforce licence breaches with appropriate consequences, including prosecution.

In the experience of our organisation there is a significant and obvious lack of consistency between licences for different facilities. Many licences are very general and do not prescribe types and

quantities of emission from a given facility. The lack of detail and consistency make it difficult for the regulatory agencies to take effective legal enforcement action. These ambiguous licence conditions ensure the matter never progresses past the stage of Crown Law advice or is dropped due to unenforceable conditions.

This situation places public and environmental health at risk by encouraging industry to relax environmental standard. As it stands an environmental legal action, other than a nuisance or other claim in common law, can only be approved by the CEO of the DEWCP with the Minister's assent. The lack of third party suit rights under the EP Act 1986 and current amendments, further limits the consequences for industries who breach license conditions or create environmental health problems.

The Alliance is pleased to be able to contribute toward the current reform of licence conditions in the hope that licences will once again be drafted to achieve the intent of the EP Act with regard to environmental harm. Strong licence conditions and guaranteed enforceability before the courts will help to restore trust in environmental regulators in this state by providing the most important tool for enforcement measures.

Without legally sound licensing system, the current debacle in environmental regulation will deepen and the trust of the community may never be recovered. In this sense any reform of licences and their enforcement should be bold rather than incremental and should be robust enough to help drive industry and the community out of continual conflict and into an era of ecological sustainability and more cooperative relations.

Support for Recommendations in Final Report (from Contaminated Sites Alliance submission)

Recommendations supported	More detail required for decision.	Recommendations not supported
Role of licences		
R 1 –R7		
R8 with some concerns about offsets and trading in toxics		
R9		
Sustainability		
R 10 -15		
Stakeholder involvement		
R16-18	R19 Generally support but HDWA advice on emission limits must be peer reviewed	
Scope of licence conditions		
R20-21		
Consistency with other approvals		
R22-25		
Best practice or reasonable and practicable measures		
R26-36		
Cumulative impacts, offsets and environmental capacity		
R37-39		
Emission limits and ambient standards		
R40-42	*R43 Will support with caveats below	
	R44 Would support surrender of excess emissions but will only consider trading in non-toxic emissions	
R45		
Review and term of licences		
R46-49 support if the public ability to appeal license conditions is not		

Recommendations supported	More detail required for decision.	Recommendations not supported
diminished beyond the current situation		
Enforcement		
R50-52		
Content of conditions		
R53 -56		
DEP capability		
R57-59		**R60 Training supported However,** cannot support a recommendation that suggests DEP exchange schemes with industry. Agency capture has been the source of many complaints about DEP. Already seen as too close to industry. Exchange with consultants OK
Environmental risk	**R61** – CSA has major concerns about the use and abuse of risk assessment methodology in WA. Would only support if common HRA and ERA methodology agreed in tripartite process.	

*** dot one** – onus should be on applicants to IDENTIFY not DEFINE potentially significant emissions. An independent authority should establish by industry type which analytes are significant and at what levels of output. If the applicant believes that their proposal differs in terms of emissions from others in the industry, then justification should be provided.

Dot two- support

Dot three – Emission limits should be determined on environmental and health risk derived criteria that are the most stringent available worldwide. Where no criteria exist a limit should be determined through tripartite negotiations. The current health risk assessment methodology available in WA is unsuitable for determining emission limits.

Dot four – most fugitive sources of emissions can be measured (except perhaps odour) and should be included in a licence schedule where they can be measured.

Dot five – accepted.

Chamber of Minerals and Energy representative on Stakeholder Reference Group

In an overall context CME agrees with the findings of the review and believes that the implementation of your recommendations would largely result in an improved and more rigorous licensing system.

Water Corporation

Currently the Works Approval and Licensing system is open to criticism of "moving goalposts, unilateral and unjustified condition setting, duplication of process and over-expenditure of effort and $. The overall direction of the review is to be supported. Providing open, accountable, consistent process supported by uniform and equitable application of standards is the essential underpinning of any environmental protection system, of which licensing is but a part. There should be "no surprises" in environmental approval and regulation, no duplication of effort and no "variability at whim" in setting conditions or regulation. The review identifies and expands these matters adequately.

Department of Environmental Protection

Overall the review has addressed the terms of reference well, although the outcome is less prescriptive than was originally hoped.

2. ADDITIONAL ISSUES

There were a number of additional significant issues that were raised during the review process of the draft report. A new section in the main report entitled additional issues contains new findings and recommendations.

2.1 MOVING GOAL POSTS

Water Corporation

Section 60 (3) (a) of the Act (both previously and proposed under the new amendments) give the CEO unfettered, unilateral powers to impose conditions that "specify standards that are more stringent than those required by or under the approved policy or by prescribed standards". This can place the proponent in a situation of direct conflict where, for instance, an EPP standard is being over-ridden by the CEO (or his delegate, the licensing officer). This section of the Act alone largely undermines the philosophy and intent espoused within the review document. At best, if the CEO believes that "as a result of environmental circumstances having changed" he should refer that issue back into the process for open and accountable review and determination *prior to* giving effect to more stringent conditions. This issue is the foundation of the most contentious concern with the environmental process as a whole, and licensing specifically, that of "moving goalposts".

2.2 HIGH PRIORITY ISSUES

Chamber of Commerce and Industry

There will be a significant volume of work required to implement the recommendations. This will require careful allocation of resources and detailed implementation planning by DEWCP.

With regard to your recommendations, the areas that industry feels should be addressed as a priority include:

- R43 – R44 (revised): Conversion of all licenses to perpetual licenses with annual fees. Periodic review of conditions on individual operating licenses should then occur according to risk to the environment (either by premises or sector), valid community concern, request by the licensee or changes to the operations that have significant environmental implications.
- R1 – R5, R19 –R21: Draft license conditions should, where ever possible, be issued during the Part IV Environmental Impact Assessment process and Part V Works Approval process. License conditions should be consistent with Part IV and Works Approval Conditions. Where works approvals are for small changes to existing processes with no or minor impact, then community input into works approvals and draft license conditions should not be sought. A policy or criteria should be developed to determine those works approvals that should be open for a period for public comment (based on environmental risk) and those that can be processed directly. The period for comment on draft license conditions and works approvals should mirror the period for comment in Part IV, that is, two weeks. If the license is part of the Part IV process then the public review has already been conducted through the consultation process and the two week period is the appeal period.
- R37-R40, R49-R50, R53 (revised): License conditions should only apply to emission limits. Emission limits should be determined objectively in accordance with an assessment of environmental risk, harm or pollution, and should be consistent with standards that are widely accepted in other jurisdictions. Targets should be included in Environmental Improvement Plans, not in licenses.

- R48: Throughput should not be inserted into license conditions but may be used to describe the approximate scale of the prescribed activity.
- R52 (revised): Comprehensive training for DEWCP officers and a strategy developed to retain trained/experienced officers.
- Part R9, R15, R16 (revised), R34: Development of other administrative procedures and guidelines to ensure, transparency, clarity, consistency and certainty.

2.3 MATTERS TO BE CONSIDERED WHEN SETTING CONDITIONS

Water Corporation

Throughout the Act, whether through license conditions, regulations, statutory policies standards or guidelines, some fundamental principles in determining whether to develop and apply the instrument should be undertaken. This involves the following seven issues, each of which is interdependent on the other. Failure to satisfy any one of these issues should seriously call into question proceeding with the development of the condition mooted.

Where conditions are being considered, firstly determine whether there is an environmental issue that needs to be controlled/managed. It is important to ask *"Why do it at all?"* and to consider what the results would be from not taking the action. Any constraint that imposes significant cost or technological change should be justified not only on a basis of environmental cause and effect, but balanced against consideration of the social, economic and environmental consequences for failing to do so. However, *where there indications that there may be an emerging problem,* this does not preclude the application of a precautionary approach, however it should be justified.

Any condition envisaged should have a basis at law. *"Does the regulator have the authority to do this?"* The regulator should not be acting beyond head powers (*Ultra Vires*). **Conversely,** the regulator should not act on a *"just because I can"* basis without justification. If there is no need, don't do it.

Compliance with the condition is attainable. *"Can we realistically expect this to be done? Is the technology available to deliver this condition?"* The measure should not set unattainable goals that "engineer" the operator into non-compliance circumstances.

The condition to be imposed is reasonable and practicable. *"Is this consistent with what we would expect others to do in similar circumstances?"* Current state of knowledge and acceptable practice in like industries in like circumstances forms the basis of this question. Demands for "beyond best practice" or for "Best Available Technology" are unreasonable if out of balance with the social, economic and environmental needs and values, or requirements imposed on other comparable industries. There is the "golden thread" of reasonableness and practicability throughout the Environmental Protection Act. This takes into account cost, on the basis of cost to do something versus the cost for failing to have done so (not direct economic burden).

The condition should be enforceable. *"If imposed, do I know what I have to do to comply?"* If there is insufficient specificity at law from which the licensee can clearly determine his responsibility, the measure should not be written.

Performance (comply/non-comply) should be measurable. *"Can I measure my performance against the condition and relevant standards to determine whether my performance is adequate?"* There must be a means of determining performance (compliance/non-compliance). The absence of appropriate analytical techniques that are in themselves relevant, reasonable and practicable, traceable to the appropriate standards and defensible technically suggests the instrument should be rethought or abandoned in its mooted form.

The instrument should have Parity and Equity in approach. *"Are we being treated differently?"* This has several dimensions in terms of limits and standards:

- an even-handed approach to application for all stakeholders;
- ensuring that one player does not get forced to world's best practice while other contributors to an environmental problem remain unregulated and the environmental load (say from an emission) consequently remains unacceptably high; and
- an "equal opportunity" to negotiate concessions or variations to accepted standards and management processes available to all. The opportunity to argue and sustain a case should be based on the merit of the argument and balanced with the societal and economic benefit to be gained, not blind adherence to standards or process for standard's or process's sake.

The decision in this process must be recognised as less technical and more political in nature

3. SPECIFIC COMMENTS ON FINDINGS AND RECOMMENDATIONS

Draft Issue/Finding	Comment	Draft Recommendation	Comment
Role of licences			
Overall comment	**Eastern Metropolitan Regional Council representative on Stakeholder Reference Group** The findings on the role of licences are supported, particularly relating to licences being the last link in the approvals process and the need to address some of the issues contained in licence conditions earlier in the approvals process. Licences are not well understood by the community, but should be used in circumstances where a premises poses substantial environmental risk where ongoing management is required. There are a range of other instruments available to undertake the role of licences (Part IV assessments, Ministerial Conditions, Works Approval Conditions etc) and the number of licensed premises that are licensed requires review and should be reduced based on environmental risk factors.		**Eastern Metropolitan Regional Council representative on Stakeholder Reference Group** In terms of the recommendations 1-7, these are also supported as these will assist in clarifying the role of licences and integrating the licencing process with other processes such as EIA and Works Approvals. **Chamber of Minerals & Energy representative on Stakeholder Reference Group** The concept of establishing indicative works approval conditions during the Part IV approvals process, and that these conditions are consistent with future licence conditions, would be a worthwhile approach. However, to achieve this the disconnect between officers administering Part IV and those administering Part V of the Environmental Protect Act (EP Act) would need to be addressed. The possibility of one officer following a project through both areas would provide a number of benefits to all stakeholders. **Conservation Council of WA & Environmental Defenders Office WA** We also support the recommendation that environmental acceptability of emissions and management controls from prescribed premises should be determined during the assessment of proposals rather than in the licensing process. However, the Review should acknowledge that even the assessment process may not be sufficient to ensure that there is early consideration of issues of acceptability and location. For example, subdivision decisions which involve building prescribed premises are often made by the Western Australia Planning Commission before the DEP is involved in the assessment of the premises at the works approval stage. In such cases, the DEP is hamstrung in its ability to make any recommendations or decisions about the locality of the prescribed premises – the works approval assessment will relate purely to the provision of the prescribed premises in a pre-determined place. The Review should therefore recommend that, to ensure adequate early consideration of the environmental acceptability, particularly location, of prescribed premises, there will need to be a review of all statutory approval processes - not just those under the Act.
1. There are a number of other instruments available under the Act	**DEP** The DEP agrees that licenses are not the only regulatory tool	1. Environmental acceptability of emissions and management controls	**DEP** No action required for new proposals being, or those

Draft Issue/Finding	Comment	Draft Recommendation	Comment
that are effective in the control of emissions from prescribed premises.	available for the control of emissions from prescribed premises. However, licenses are a powerful and flexible tool that should be used ahead of more draconian options like PANs, Directions or enforcement action	from prescribed activities should be determined during the assessment of proposals under Part IV of the Act or the application for a works approval rather than in the licensing process.	recently, assessed by the EPA. For existing premises, re-assessment of measures employed to ensure environmental acceptability through the licence may be necessary on a periodic basis, or when specific issues arise (e.g. Cockburn Cement, Wagerup), or when proposals for change are submitted for works approval. Where proposals are not assessed by the EPA, the works approval process is a more critical tool in achieving environmental acceptability. **Chamber of Commerce & Industry** This works for new projects and significant upgrades that require assessment, but not ongoing operations. Add "where possible" to end of recommendation.
2. The role of licensing and other statutory instruments under the Act are not well understood by the community. The licence is the last "link" in the environmental approval chain and is an effective tool for ongoing management of operations particularly where management of environmental risk and continuous improvement is an important issue.	**DEP** It is also agreed that this is not generally understood, and that the licence is one of a range of environmental control mechanisms, each of which have different strengths and roles.	2. Wherever practicable, information on the likely conditions that may apply at the works approval stage should be available during Part IV environmental impact assessment and similarly the licence conditions and information on operational controls and emissions should be available at the works approval stage.	**DEP** The DEP will endeavour, to the extent that information is available, to make available draft works approval conditions during the EIA process, and draft licence conditions during the works approval process. **Chamber of Commerce & Industry** Agreed
3. The environmental acceptability of a proposal or work is best assessed upfront through environmental impact assessment under Part IV and the assessment of works approval applications rather than the subsequent licence application. This approach adds certainty to the process for the applicant (provided the proposal or works has been completed in accordance with those approvals), and encourages more effective community input to decision-making during early stages of the design and development of the proposal or work.	**DEP** The DEP also agrees that greater emphasis needs to be placed on the EIA process for establishing the overall acceptability of a proposal, where a proposal is subject to EPA assessment. It is noted however, that there are over 2,200 prescribed premises already operating throughout WA, and the major tool for the management of emissions from these at present is the licensing and registration process.	3. Works approval and licence assessments should be run concurrently wherever practicable.	**DEP** See point 2. **Chamber of Commerce & Industry** Agreed.
4. Availability of information on the controls, emissions and likely licence conditions during the Part IV environmental impact assessment or works approval stage would also reduce the "pressure" on the licensing process and assist in	**DEP** It is agreed that where possible, more information should be provided on likely works approval and licence conditions during the EIA process to assist in more effective community input and decision-making. However, in many cases, insufficient detail is available at the EIA stage to enable	4. Administrative procedures should be developed to encourage concurrent assessment of proposals under Part IV of the Act and works approval and licence applications.	**DEP** The DEP will examine its administrative procedures with a view to facilitating concurrent assessments as proposed. **Chamber of Commerce & Industry** Agreed

Draft Issue/Finding	Comment	Draft Recommendation	Comment
upfront determination of the acceptability of emissions.	definitive emission limits to be proposed. It would also need to be clear that these draft conditions would not unduly constrain the proponent in making legitimate changes to the proposal and would not be subject to appeal during the Part IV stage of the approvals process.		
5. Licences are appropriate where emissions pose a substantial environmental risk and community concern which warrant ongoing management. A licence provides a useful mechanism for the facilitation of emission trading and environmental offsets.	**DEP** The underpinning rationale of licenses as set out in the current Act, is for the control of emissions of waste to minimise the likelihood of pollution. Unless this rationale is extended, the role of licensing is legally constrained to focus on emissions that pose a significant (i.e. demonstrable) environmental risk. In this context, it is not yet clear to what extent "community concern" should influence the assessment of environmental risk and the setting of licence conditions. It is agreed for a licenses can be used as a tool to facilitate emissions trading and environmental off-sets. **Water Corporation** A licence provides a useful mechanism for the facilitation of emission trading and environmental offsets". This is agreed, in terms of "facilitation", but should not imply a mandate in any way as both emissions trading and environmental offsets (at least in "greenhouse" terms) currently have no legal basis as they are initiatives contained in the Kyoto Protocol, which is still to be ratified, including by Australia	5. Draft works approval and licence conditions should be incorporated into the EPA bulletin along with recommended Ministerial conditions.	**DEP** This recommendation is not supported as the best way to provide draft works approval or licence conditions for information and comment. **Chamber of Commerce & Industry** Agreed
6. A licence is not an appropriate instrument to bring a known polluting industry into line but it may be an effective instrument to facilitate the implementation of policies.	**DEP** It is agreed that industries demonstrably causing pollution should be dealt with through enforcement measures rather than by licensing. However, licensing has a role in encouraging reductions in waste emissions over time, or bringing industry into line with changes policy requirements.	6. The role of licensing should be considered carefully during the next major review of the Act but in the interim a licence should be considered as appropriate where there is need for: • an ongoing dialogue between the community, DEP and the licensee in terms of environmental improvement; • ongoing management and reporting of emissions because of the potential environmental risk posed by an activity; • emissions trading and offsets; and • bringing activities into line with new or changes to approved policies.	**DEP** The DEP will adopt this approach and will input these concepts into the proposed review of the Act. **Chamber of Commerce & Industry** Dot point 1- This conflicts with other statements regarding EIPs later in the list – ie dialogue between licensee, DEWCP and community is undertaken via the EIP process. Dot point 2 - Agreed Dot point 3- Agreed Dot point 4 - Agreed
		7. Polluting activities should not be licensed.	**DEP** The DEP will embed the principle of not licensing industries

Draft Issue/Finding	Comment	Draft Recommendation	Comment
			demonstrably causing pollution within a general policy on licensing philosophy and enforcement of environmental standards. **Chamber of Commerce & Industry** A licence is a permit to emit, not to pollute, limits in the license are set to prevent pollution. Therefore if a premises is operating within license conditions then no pollution is occurring. Polluting activities should be dealt with under the Pollution Abatement Notice provisions of the Act rather than through licence conditions. If DEWCP pursue licenses with limits and targets then the upper criteria should be based on scientific information about impact, and the lower one indicates a target emission level. If the upper one is exceeded, there is a *prima facie* case of pollution that would be subject of an enforcement process. In most cases, the lower level would be at or below current performance, and is a measure for tracking an EIP or similar instrument. Exceedences would not result in any enforcement action. **Chamber of Minerals & Energy representative on Stakeholder Reference Group** For clarity of intent Recommendation 7 could be better worded along the lines of "Activities that result in unacceptable environmental outcomes should not be licensed".
Sustainability in licences			
Overall comment	**Eastern Metropolitan Regional Council representative on Stakeholder Reference Group** The findings identified in this chapter indicate that sustainability provides a useful framework for the licencing process, however there needs to be adequate consultation and community involvement and consideration of social impact to adequately incorporate social factors. Similarly, there is currently limited consideration of economic factors in the licensing process and the degree to which this can be undertaken to achieve triple bottom line objectives is questionable. Most of the sustainability issues need to considered early in the approval process (ideally at EIA stage), with objectives and indicators identified at this time to form the framework for the licence (if applicable and appropriate – these may only be relevant to specific industries and/or projects).		**Eastern Metropolitan Regional Council representative on Stakeholder Reference Group** The recommendations identified under sustainability are considered appropriate and will require additional resources and costs to Government and industry to achieve genuine consultation outcomes and to implement effectively. These factors need to be considered in developing processes for policy development and licence review. **Chamber of Minerals & Energy representative on Stakeholder Reference Group** As the system in question is specifically an environmental licensing system the application of sustainability may not be appropriate. It is suggested that recommendations 8 -12 relate more to transparency of process than to sustainability. **Conservation Council of WA & Environmental Defenders Office WA** Our current regulatory system and our current industrial technologies will not get us to where we need to go. Sustainability principles are not reflected in our licensing system and there is no incentive to think differently and creatively about the sustainable use of resources. Rather

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			than just mitigating and minimising pollution we should be aiming for zero pollution – the Government's commitment to zero waste needs to be included where appropriate in all decision making including the new licensing system. A sustainable Western Australia will comprise a community that is aware of where its products and services come from, where its wastes go and their impact on humans and other species. It will understand the need to protect natural resources and be aware that nature does not have an infinite capacity to absorb wastes. It will have taken ownership of the waste management problem and its environmental, social and economic impacts and it will take pride in its achievements in minimising and eliminating waste and reward those who are innovative and make progress towards sustainability. The Review outlines some of the principles proposed for the amendments to the Environmental Protection Act 1986 (WA) (the Act) and comments that community engagement is not directly referred to in the Act. We agree that an informed and involved community is an integral part of a sustainable society. We agree that it should also be a key to the process of determination of licence limits and policies. We would also add the principles of environmental justice and transparency in decision making. **Environmental justice** By this, we mean that the goal should be that no part of the population, regardless of race, color, nationality or income, should suffer disproportionately from adverse health or environmental effects. All people have the right to live in clean, healthy and sustainable communities. **Transparency in decision** making All communities must have access to full information about their environment and access to all information that will enable them to play a meaningful role. Public documents and notices must be concise, understandable to the community involved and made readily accessible to the public. We note that the Environmental Protection Amendment Bill 2002 (the Bill) proposes to insert various objects designed to achieve sustainability, . However, the CEO of the DEP is not required to take any of those objects into account when making licensing decisions and is will not be accountable if she departs from the objects. The objects will therefore generally direct licensing actions and policy, but it will be difficult to review the CEO's decision under the Act on the basis that the licensing decision is inconsistent with one of the objects. This could make the objects of relatively marginal utility. We therefore submit that the CEO should be required to take the sustainability objects into account when making licensing decisions.

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7. Sustainability can provide the necessary intellectual and strategic framework for the licensing process.	**DEP** While the general principles of sustainability provide an intellectual and strategic framework for licensing, they need to be interpreted through specific policies to provide specific licensing guidance at the premises level. Note also that the Act makes no provision for incorporating other than environmental considerations (specifically, waste discharges) into licence conditions.	8. The licensing process should have regard for community engagement and the principles under proposed amendments to the Act.	**DEP** The DEP will continue to incorporate these issues into its licensing policies. **Chamber of Commerce & Industry** If it is accepted that the definition of sustainable development [or sustainability] is meeting present needs without compromising the ability to meet future needs then DEWCP would be required to support all industries which supply current needs without adverse human health or environmental outcomes.
8. There are aspects of licensing that can facilitate the achievement of sustainability objectives. The principles under the proposed amendments to the Act together with community engagement provide for the implementation of sustainability.	**DEP** The DEP agrees with, and is supportive of this point within the limitations imposed by the Act and the resources available to participate in community engagement. **Water Corporation** Finding 8 refers to the facilitation of the achievement of sustainability objectives through the (sustainability) principles, under the proposed amendments to the EPAct. However, neither the Interpretation, nor the Object and Principles sections under Part I of the proposed EPAct, define "sustainability". "Sustainability" can mean different things to different people, from "environmental sustainability", to "ecological sustainability", to "triple bottom line sustainability". Clarity in meaning is essential, otherwise interpretive inconsistency will contribute to the "moving goal-posts.	9. In addition to the above, the following should be implemented to move towards sustainability: • Development of an appropriate sectoral, activity, environmental or local areas policy framework. • Consideration of licensing issues in the broader environmental context as early as possible in the environmental approval "chain". • Development of procedures to ensure transparency, clarity and certainty in the administration of the licensing and policy process. • Encouragement of direct engagement of the community by the licensee in conjunction with the regulator to seek optimal outcomes for improved environmental performance. • Public reporting of environmental performance (both good and bad) by licensees and the regulators. • Positive incentives for licensees to achieve improved environmental performance on an ongoing basis. • Independent auditing of environmental performance.	**DEP** Where appropriate, these issues will be incorporated into DEP licensing policy. Proposed specific initiatives include: • Introduction of compulsory annual compliance reporting for licensees and publishing of these reports on the DEP web page. • Development of an Environmental Improvement Plan system similar to that operating in South Australia and Victoria (and to some extent via the use of proponent commitments in the Part IV process). These would enable companies to develop holistic environmental management plans in consultation with the local community and be relieved of prescriptive licence conditions. • Development of independent auditor criteria and definition of when and how these can be used. The issue of providing incentives for good environmental performance will have to be considered further, including a review of best practice licenses. **Chamber of Commerce & Industry** These are more administrative issues than sustainability issues – however, they would be good changes, to the advantage of all three groups. Public reporting related to licensing should be about licence compliance only, not operational performance. EIPs, which should be voluntary, will develop their own reporting criteria that may include reporting on the web site. Independent auditing of environmental performance would add substantial cost for licensees and should only be required in cases of persistent non-compliance with licence conditions, or be undertaken voluntarily under an EIP. **Conservation Council of WA & Environmental Defenders Office WA** (dot point 6) The time is ripe to transform the licensing system to a driver of sustainability. Governments worldwide

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			are looking to reinvent environmental regulation. Some are trying to incorporate sustainability principles. We would like a more complete examination of the process worldwide – in the US alone there are some 30 programs being trialled. All are trying to move beyond the 'command and control' methods of the past, which although bringing a cleaner environment, are ill equipped to bring industry to the next level of progress towards sustainability. There is growing effort to encourage and foster innovative and effective strategies for achieving environmental improvements through non-regulatory approaches. Benefits for companies include public recognition and regulatory flexibility. Providing the tools and the resources needed to address the challenge of sustainability is vital. However, new programs such as "Sustainability Covenants" will compete with traditional enforcement, already under-resourced, for scarce resources. Thus their efficacy elsewhere, both overseas and as they develop in Victoria, must be closely examined. Further, we note that at present we do not have a strong supporting legislative and policy framework or widespread education for sustainability. Implementing sustainability will, however, need to clear and comprehensive regulatory integration agendas and clear Government resourcing commitments for any chance of success.
9. The policy framework for licensing is grossly inadequate. DEP has enhanced policy development but the process for stakeholder involvement in the preparation of these policies has yet to be articulated.	**DEP** The DEP agrees that its licensing policy position and involvement of stakeholders in policy development has been inadequate, and particularly lacking in stakeholder engagement. This review was commissioned in part to clarify this issue and seek guidance on a way forward.	10. DEP should in conjunction with stakeholders develop a process for stakeholder involvement in the preparation policies.	**DEP** This issue swill be developed initially in consultation with the Stakeholder Reference Group. **Chamber of Commerce & Industry** Identification of legitimate stakeholders and the role that they may play needs to be clearly and publicly defined. There are current examples of disaffected stakeholders that only engage after consultation and decision-making has been completed. Elected Government must not be allowed to use consultation as a mechanism to abrogate its representative and decision-making role by allowing limited issue self-nominated representatives to dominate decision-making. 'Rules of engagement' need to be understood and accepted by all parties prior to entering the process, not just developed *ad hoc*.
10. Negotiated "tripartite" environmental agreements may be an alternate option to the development of formal policies under the Act. However, there is currently no head power for such agreements to be prepared and given effect under the Act.	**DEP** The DEP agrees that environmental agreements may substitute for formal policies and deal with issues beyond emissions, but that statutory instruments such as Victoria's sustainability covenants are not available under the current Act. The DEP's initial preference is to develop its policy base, including EPPs, in preference to a range of individual agreements.	11. The negotiated agreement approach should be used for the development of policies in preference to the traditional "publish and defend" approach.	**DEP** See 10 (note that this approach is being adopted as part of the Water Corporation Wastewater Environmental Performance Agreement process). **Chamber of Commerce & Industry** Agreed

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11. The licensing process needs to be more transparent, clear and certain.	**DEP** The DEP agrees with this point, noting again, that one function of this review was to identify options to deal with this issue. **Water Corporation** I agree, but the licensing process also needs to be more consistent	12. Consider further changes to the Act in the future to enable: • Preparation and implementation of negotiated agreements. • Preparation of neighbourhood, catchment or local area plans by approved persons. • Accreditation of environmental auditors. • Positive incentives/reward schemes for environmental improvement.	**DEP** These proposals will be fed into the next Act review for consideration. **Chamber of Commerce & Industry** 3rd dot point already possible under EPPs.
12. Greater use of independent auditing or assessment of environmental performance by DEP accredited auditors or consultants would enhance community confidence in the licensing process.	**DEP** The DEP agrees with this point to some extent, but sees independent auditors as an adjunct to the delivery of its statutory functions, not a replacement. **General** **Eastern Metropolitan Regional Council representative on Stakeholder Reference Group** The findings identified in this chapter indicate that sustainability provides a useful framework for the licencing process, however there needs to be adequate consultation and community involvement and consideration of social impact to adequately incorporate social factors. Similarly, there is currently limited consideration of economic factors in the licencing process and the degree to which this can be undertaken to achieve triple bottom line objectives is questionable. Most of the sustainability issues need to considered early in the approval process (ideally at EIA stage), with objectives and indicators identified at this time to form the framework for the licence (if applicable and appropriate – these may only be relevant to specific industries and/or projects).		
Stakeholder involvement			
Overall	**Eastern Metropolitan Regional Council representative on Stakeholder Reference Group** I support the consideration of stakeholder involvement, licences and works approvals early in the approval process to achieve greater certainty and transparency as outlined in the findings.		**Eastern Metropolitan Regional Council representative on Stakeholder Reference Group** The recommendations are also supported, but will have significant resource implications for the DEP. Reducing the number of licences issues by the DEP, to concentrate on those industries with greater environmental risk, may offset resource demands. Industry will also need to allocate additional resources should they pursue EIP's as a voluntary initiative to enhance transparency and community participation and involvement.

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			Chamber of Minerals & Energy representative on Stakeholder Reference Group The need for established timeframes for response and input from stakeholders is important to help establish certainty of process. CME feels that it is equally appropriate for timeframes to be established for actions and responses from the DEP. **Conservation Council of WA & Environmental Defenders Office WA** We agree that it is important to encourage involvement of the community at the earliest stage of environmental assessment when decisions on acceptability or location are made. Therefore, subject to the following, we generally support recommendations 13 to 16 *Reasons for Decision* It is often the case that members of the public are baffled by the DEP's licensing decisions, and in particular, the reasons behind those decisions. This is partly because the public are simply not told about why decisions were made. We therefore submit that licensing decisions, and the reasons for those decisions, should be recorded and made freely and publicly available. A comprehensive public register of licensing decisions and the reasons for those decisions will ensure that the public is informed of the DEP's consideration of licensing options and resulting decisions. It will also assist the DEP in making consistent future licensing decisions. Indeed, one of the most effective mechanisms to ensure that an agency's decisions are sound and to inhibit "regulatory capture" is to require it to provide reasons for its decisions. As Volker notes: "Probably the most significant of all the changes for improving administration was the requirement to provide written statements of reasons and findings of fact. This meant that public servants had to be more systematic and disciplined in their approaches to decision making. They even had to ensure that their decisions were in accordance with the applicable legislation and any policy guidelines that might apply."[1]
13. There are opportunities for works approval conditions to be made available during the Part IV assessment process and licence conditions to be developed concurrently with the works approval process.	**DEP** It is agreed that more information should be provided on likely works approval and licence conditions for projects that are assessed by the EPA to assist in more effective community input and decision-making. However, in some cases, insufficient detail is available at the EIA stage to enable definitive emission limits to be proposed. It would need to be	13. Stakeholder involvement should be encouraged during the works approval process when decisions on the design and location of a work may be assessed.	**DEP** The DEP is developing a guideline for stakeholder consultation by licensees and will amend the works approval and licence application packages to indicate that appropriate consultation by the proponent is a pre-condition to approvals. The DEP will also develop its own consultation policy and procedures, picking up, where

[1] Volker, "Just Do It – How the Public Service Made It Work" Volume 8 *Australian Journal of Administrative Law* August 2001 at 204.

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	clear that these draft conditions would not constrain the proponent in making legitimate changes to the proposal and were not subject to appeal during the Part IV stage of the approvals process.		possible the specific suggestions in recommendation 16. Note that a works approval cannot be used as a site approval process, although site characteristics will influence the conditions imposed. **Chamber of Commerce & Industry** As per above, involvement should be clearly defined. Government must not be allowed to abrogate decision making for the common good on the basis of a few represented stakeholders. Location should not be up for debate if the project has already gone through a Part IV approval. **Water Corporation** This suggests the introduction of stakeholder involvement in the process. Whilst this is a laudable aim, it must be done without concurrently introducing new and unacceptable delays in the approval process
14. Stakeholder concerns are better addressed early in the development of the proposal or work to reduce the pressure on the licence application process. The licence process cannot address issues of environmental acceptability and wider environmental issues of concern. These wider environmental issues are usually of primary interest to the community.	**DEP** See 13, noting also that there are other statutory approval processes such as dangerous goods licensing and local government planning approvals that provide avenues for dealing with issues not directly addressed by DEP licenses.	14. Opportunities for coordinated and concurrent assessment of proposals and works approval and licence applications and conditions should be pursued wherever practicable.	**DEP** The DEP will seek to contribute more to, and earlier in the EIA process, including provision, where possible, of draft works approval and licence conditions. **Chamber of Commerce & Industry** Agreed **Water Corporation** if stakeholder concerns are addressed, then the only stakeholders who will generally want to be involved are those impacted in some way or perhaps aggrieved by the proposal (ie those that have a personal involvement or vested interest). In these cases, they will expect to discuss issues of environmental acceptability and wider environmental areas of concern. Consequently, if these areas are excluded from any stakeholder involvement in the works approval and licence applications, then such stakeholder involvement could only occur if there was concurrent assessment of the proposal.
15. The Act does not provide specific guidance on stakeholder consultation and no guidelines are available on effective consultation (DEP are currently addressing this matter). The process lacks transparency and has led to considerable uncertainty as to the opportunities for community stakeholders and licensees to provide input to the licensing process.	**DEP** The Act does require consultation with public authorities or persons with a direct interest in a works approval or licence application, but the specific means is not defined. As indicated, the DEP is developing a comprehensive Stakeholder Engagement Policy and this will be used as a basis for developing a licensing consultation policy and procedures.	15. DEP should prepare and provide assessment reports with draft and final licences to inform stakeholders as to the basis for emission limits and other conditions.	**DEP** The DEP will develop template assessment reports and incorporate them into licensing procedures. **Chamber of Commerce & Industry** Agreed

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		16. Administrative procedures or guidelines for stakeholder consultation during the works approval and licence processes should be prepared to define persons with a direct interest and such guidelines should include:
		• Encouragement to applicants to consult with community stakeholders during the preparation of licence applications.
		• Opportunity for negotiations between the licensee and the DEP on proposed conditions or changes to licences.
		• Publication of receipt of applications or amendments should:
		  • be in the local community newspaper as well as the West Australian;
		  • include a short description of the subject of the application/amendment;
		  • invite community stakeholders with an interest to nominate and provide submissions over a minimum period of two weeks; and
		  • advise of locations where applications may be viewed.
		• Provision of a copy of the draft licence/works approval together with the draft assessment report to the licensee and those community members who nominated an interest and provided initial submissions.
		• Allow four weeks for receipt of community stakeholder and licensee comments on the draft works approval or licence.
		• Advice from Health WA on all applications.
		• Opportunity for DEP to convene a conference between community stakeholders, public authorities
			DEP
			See 13. Advertisement in local newspapers and provision of greater details may not be possible due to timing problems and cost. However, the DEP will seek to provide (subject to funding) more detailed information on the DEP web page, including draft condition sets and assessment reports. The DEP will also endeavour to provide sufficient time for appropriate consultation and feedback on draft works approval and licence conditions as suggested.
			Note that until the overall licensing workload is reduced, resource and time constraints would preclude the DEP from engaging in a stakeholder involvement process as proposed in Figure 2 of the review report for all premises.
			The most appropriate way to involve the Department of Health in works approval and licence condition-setting will be pursued separately.
			Chamber of Commerce & Industry
			See comments above and below
			Four weeks should not apply for licensing unless the licence review period is extended to 5 years or more; nor should it apply to premises that are undertaking works in accordance with an agreed EIP, nor to works that are being undertaken in accordance with a Part IV approval.
			Health WA should be involved in setting ambient standards, etc. It is not necessary to consult them on all applications if ambient standards are well known and easily accessible.
			Conservation Council of WA & Environmental Defenders Office WA
			Recommendation 16 provides that people with an "interest" in a licence application should be invited to make submissions on that application. We submit that only allowing people who have an "interest" in a licence application to comment on it will be problematic. For example, will create unnecessary administrative burden for the DEP, which will have to develop and then apply policies for determining who has an interest. And as those policies will necessarily incorporate some degree of discretion, decisions about who has an interest and who doesn't may appear confusing, inconsistent and arbitrary to the public, causing them to lose confidence in the licensing system. Another problem inherent in requiring people to have an "interest" in a licence application before accepting their submissions is that the public may be reluctant to expend the considerable effort necessary to prepare submissions if they are unsure of whether they have an "interest" or not.

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		and the applicant/licensee to resolve issues as required. • Guidelines for conduct of the environmental improvement plan process. • Publication of the licence on the DEP web page upon issue with the final assessment report.	Finally, we note that it is notoriously difficult for Courts, let alone regulators, to determine what constitutes an "interest" sufficient to permit a person to participate in any statutory process. Requiring a person to have an interest in proceedings will therefore add unnecessary complexity and legality to the system, and will reduce the chance that the community's important local knowledge be incorporated into decision-making. We submit that licence applications be widely advertised and that any person be able to make submissions. As you know, the Act currently provides that the Chief Executive Officer (CEO) must take into account comments from any person which or who in the opinion of the CEO has a direct interest in the subject matter of the licence application: section 57 (2) (b). Legislative change will be required to ensure that the CEO is required to take submissions from any person into account. However, there is no legal constraint on the CEO receiving and taking into account submissions from any person before the legislative amendments are in force. The CEO may in fact already use her discretion under the Act to take submissions from any person into account. We therefore submit that the Review should recommend an immediate change in the DEP's policy and practice with respect to licence submissions, as well as legislative reform.
Scope of licence conditions			
Overall	**Eastern Metropolitan Regional Council representative on Stakeholder Reference Group** The scope of licence conditions varies considerably at present, even for similar industries and activities that have corresponding risk profiles. There is a need to standardize the scope of conditions to enable certainty and equitability. Environmental risk assessments, taking into account actual, expected and perceived risks are considered an appropriate basis for setting the scope of licence conditions. Over time, there should be a common approach to licence setting through the licence review process, with consideration of changes to standards and legislation, continual improvement and performance management.		**Eastern Metropolitan Regional Council representative on Stakeholder Reference Group** The recommendations for scope of licences are supported. It is also recommended that the DEP continue to develop generic industry or activity specific licence conditions to assist in achieving commonality, certainty and equity for the benefit of all stakeholders.
16. There are major conflicting views on the ability of the current Act (and the proposed amendments to the Act) to apply conditions that impose emission limits based on waste minimisation principles.	**DEP** The DEP considers that the wording of the current Act focuses on minimising the likelihood of pollution whereas concepts such as waste minimisation gained currency many years after the Act was drafted. The DEP looks to the review of the Act as an opportunity to reconsider this focus.	17. Consideration should be given to amending the Act to make it clear as to the scope of licence conditions.	**DEP** The DEP will include this in the review of the Act. **Chamber of Commerce & Industry** Agreed

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	Water Corporation Raises the question of whether the Act is able to apply conditions that impose emissions limits based on waste minimisation principles. However, it is not clear whether the Review is suggesting that this should be the case. This is an interesting debate in its own right. (note it is addressed in more detail from finding 22).		
17. Under the current Act uncertainty can be taken into account in setting emission limits or ambient standards in line with the precautionary principle. Environmental risk assessment approach would be the major consideration in the setting of limits and other conditions (refer Section 17).	**DEP** The DEP agrees with this statement.	18. Emission limits and ambient standards imposed through licence conditions should take into account uncertainty, environmental risk, ambient levels and any approved policy. Refer also to recommendations in Section 13.	**DEP** These concepts are already embedded into licence condition-setting policy, but may be clarified as this policy is reviewed. **Chamber of Commerce & Industry** The Enforcement and Prosecution Policy should recognise the safety factors that are implicit in the recognised standards.
Consistency with other approvals			
	Eastern Metropolitan Regional Council representative on Stakeholder Reference Group The findings and recommendations contained in this section are supported and also have relevance to other sections discussed in the report.		**Eastern Metropolitan Regional Council representative on Stakeholder Reference Group** The findings and recommendations contained in this section are supported and also have relevance to other sections discussed in the report. **Chamber of Minerals & Energy representative on Stakeholder Reference Group** The opinion of CME in regard to these recommendations is consistent with comments made in regard to Recommendations 1 -7 above. **Conservation Council of WA & Environmental Defenders Office WA** We support the recommendations to review and correct the consistency of licence conditions with Part IV approval or works approvals, and to develop administrative procedures for the integration and coordination of approval processes under Part IV and Part V of the Act. We would wish to be involved in any such Review. We note that the Review should take into account the fact that Part IV relates to relatively few proposals. Therefore while it is important to ensure that Part IV decisions and licensing decisions are consistent, the Review should equally focus on ensuring that the procedures for issuing works approvals and licensing decisions are streamlined and consistent.
18. Licence conditions more or less stringent those in the corresponding Ministerial Statement are likely to be challengeable in law.	**DEP** In general the DEP has attempted to set conditions that are consistent with Ministerial statements while retaining the option to be more stringent where necessary. To date, no licence conditions have been challenged on these grounds.	19. The consistency of licence conditions with Part IV approval or works approvals should be reviewed and corrected as licences are renewed or reviewed.	**DEP** The DEP will conduct an ongoing review of conditions and correct them as necessary. **Chamber of Commerce & Industry** Agreed

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19. There are inconsistencies and divergence between approvals under Part IV and licences and works approvals which cause a lack of clarity and certainty.	**DEP** The DEP does not dispute that some inconsistencies do exist and is seeking to remove these through better policy development and implementation. It is unclear whether this is a general problem or whether some specific issues are giving this impression (e.g. Wagerup).	20. Administrative procedures should be developed for the integration and coordination of approval processes under Part IV and Part V of the Act between the EPA and CEO.	**DEP** The DEP will endeavour to streamline the Part IV and Part V approval processes as suggested and provide draft works approval and licence conditions during the assessment process. **Chamber of Commerce & Industry** Agreed
20. There are benefits for both the licensing and the EPA's environmental impact assessment processes if proposed licence (and works approval) conditions were made available to the EPA before it reports to the Minister.	**DEP** The DEP agrees with this and will, subject to availability of information, attempt to provide draft works approval and licence conditions during the EIA process. **Water Corporation** The inefficiency, duplication, significant over-investment of effort, detail and money (perceived or real) created by the Works Approval and Licensing system needs rectification (urgently). There appears to be an artificial demarcation between Part IV and Part V of the Environmental Protection Act in environmental approval and condition setting. If not at law, this demarcation certainly manifests itself in practice and application. Projects that have gone through Part IV can often expect a full suite of "re-assessment" under the Part V Works Approval and Licensing processes. Often this brings focus back on to issues of low environmental significance, dismissed as not Relevant Factors under Part IV. It is felt that a scheme of concurrent (rather than sequential) assessment, coupled with common processes and conditions could be explored and expanded in the review. For example, the "low level" Part IV processes be modified to incorporate the works approval processes under Part V at the same time, thus streamlining and integrating the condition setting processes of the Act.	21. The emphasis of these procedures should be to ensure proposed licence or works approval conditions are available, wherever practicable during the EPA's assessment process.	**DEP** See 20. **Chamber of Commerce & Industry** Agreed
21. Ultimately a rationalisation of approval processes, instruments and decision makers under the Act is warranted.	**DEP** The DEP agrees with the intent of this statement and will include consideration of this issue in the review of the Act	22. In the long-term, rationalisation of approval processes and decision makers under the Act should be considered.	**DEP** The DEP will forward this recommendation for consideration in the review of the Act. **Chamber of Commerce & Industry** Agreed
Best practice or reasonable and practicable measures			
Overall	**Eastern Metropolitan Regional Council representative on Stakeholder Reference Group** It is agreed that there is considerable ambiguity with regard to the terms "best practice" and "reasonable" and there is benefit in clarifying their intent. The findings related to these issues appear to be reasonable and cover issues from industry, regulator and community perspectives. Having		**Eastern Metropolitan Regional Council representative on Stakeholder Reference Group** The recommendations identified in this section are supported in principle and worthy of further consideration

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	sound policy foundations for the setting of licence conditions, standards and limits will be beneficial for all stakeholders and again requires additional resources from the DEP for policy development, consultation and implementation. The use of EMP's and EIP's for activities that represent ongoing risk and community concern is supported, but requires further investigation in terms of costs verses benefits (to industry and Government). If supported, there may be opportunities to complement this initiative with public environmental reporting and sustainability.		
22. The primary function of licensing under the Act is to protect the environment and not to develop "technology based limits". The application of waste minimisation principles (taking all reasonable and practicable measures) is a process driven by the licensees in accordance with their circumstances, the environmental risk posed by the activity and approved policy and encouraged by the regulator. The process may involve negotiated agreements (environmental improvement plans as in Victoria) between the licensee, regulator and the community where there are substantial community concerns.	**DEP** The DEP agrees with this statement, but notes that in protecting the environment limits can legitimately be technology-based **Water Corporation** Agreed. (note that it addresses the point regarding Finding 16).	23. The Act should be amended to ensure that waste minimisation principles can be addressed in licensing and works approval processes and the offence for not taking all reasonable and practicable measures should be removed from the Act.	**DEP** The DEP agrees with the first statement. Removal of s51 will be considered in the the review of the Act. **Chamber of Commerce & Industry** Agreed that the offence for not taking all reasonable and practicable measures should be removed from the Act, although retained as a principle. If licences are for setting limits that prevent pollution and environmental harm then waste minimisation refers to targets, which are voluntary and would be included in an EIP and not subject to enforcement action. **Chamber of Minerals & Energy representative on Stakeholder Reference Group** CME generally agrees with this recommendation with key points of concern covered in the general discussion heading this letter. In particular this relates to Environmental Improvement Plans. To successfully implement Recommendation 23 it would be necessary to remove Sect 51 of the act entirely not just Section 51(b) as proposed.
23. The current DEP practice of insisting on "reasonable and practicable" emission limits through changes to licence conditions is strongly criticised by many licensees and relies on a favourable interpretation of S51 and S62 of the Act.	**DEP** The DEP concedes that better documentation of decisions may clarify the manner in which licence limits are derived. The application of the reasonable and practicable test is consistent with minimising the likelihood of pollution.	24. A formal policy should be prepared on how waste minimisation principles will be applied in the licensing system and should address what is considered "reasonable and practicable". This policy should be prepared through a negotiated process.	**DEP** The DEP will develop a policy position on waste minimisation in consultation with industry and the community. This will include consideration of terms such as "reasonable and practicable" and be linked to the EPA's guidance note on best practice. **Chamber of Commerce & Industry** Agreed
24. Demonstrating that a new source is consistent with waste minimisation principles in the Part IV or Works approval process is a reasonable expectation and is consistent with modern practice.	**DEP** The DEP agrees with this statement.	25. "Reasonable and practicable" should not be driven by technology alone but also consider environmental risk and the circumstances of the individual licensee.	**DEP** See 24 **Chamber of Commerce & Industry** Agreed. Environmental risk should be the primary driver

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25. However, the arbitrary imposition of emission limits based alone on the regulators assessment of what is "reasonable and practicable" is inappropriate and can lead to less than optimal environmental outcomes. This approach adds uncertainty to the licensing process.	**DEP** See 23. It is also noted that setting limits based on the licensee's or the community's interpretation of reasonable and practicable is equally arbitrary, and less defensible on policy grounds. A tripartite (DEP, licensee, community) approach to setting limits may resolve this.	26. World's best practice should not be considered to be "reasonable and practicable" unless it can be demonstrated as such.	**DEP** See 25. **Chamber of Commerce & Industry** Agreed. Environmental risk should be the primary driver
26. The setting of ongoing targets for improved performance in situations where there is substantial community interest may require an improvement plan process involving the regulator, the community and the licensee in which agreed targets for improvement can be developed.	**DEP** The DEP agrees with this statement, but notes that this approach works best in an atmosphere of mutual trust, cooperation, understanding and willingness to compromise	27. Applicants or proponents should be responsible for demonstrating that new works or proposals are in accordance with waste minimisation principles. If there is dispute between the proponent/applicant and the regulator on the emission limits to apply, an independent expert should be engaged to provide advice.	**DEP** The issues that proponents should address in works approval applications will be reviewed and the works approval application information amended accordingly. It is the proponent's responsibility to demonstrate compliance with policy positions, or demonstrate that non-compliance does not cause unacceptable impacts in a given situation, and this may require the use of an independent expert advice **Chamber of Commerce & Industry** Environmental risk should be the primary driver.
27. The conduct of independent audits and public reporting of environmental performance (including improvements and comparisons with industry benchmarks) where there is a substantial environmental risk at the time a licence is reviewed would add confidence and transparency to the licensing process.	**DEP** The DEP agrees with this statement, but would not wish to make this a mandatory requirement for all licenses.	28. The EIP/EMP process should be adopted in the WA licensing system in situations where there is substantial ongoing environmental risk, community interest or where enhanced performance is required to meet prescribed environmental standards.	**DEP** The DEP plans to implement an EIP process modelled on the Victorian and South Australian models. **Chamber of Commerce & Industry** Community interest can sometimes be misplaced, where environmental risk is low and the operation meets performance requirements then DEWCP should be prepared to advise the community that their interest is misplaced. However the Chamber of Commerce & Industry recognises that in some circumstances the EIP process may be the most effective for disabusing the public. The Chamber of Commerce & Industry provides cautious support to the concept of Environmental Improvement Plans (EIP). Your report should be more explicit in noting that the agreements made between stakeholders in the EIP will not become part of the license conditions and hence cannot be legally pursued, and that EIPs will only be necessary for a relatively small proportion of licensees. The development of EIP's between stakeholders will only be necessary or appropriate for a relatively small proportion of licensed premises due to the nature of their business, proximity of neighbours, actual or perceived risk. Uptake of EIPs will depend largely on the provision of positive incentives, such as those associated with the accredited license system in Victoria. The Chamber of Commerce & Industry does not support transferring voluntary targets and agreements to the license in instances where companies fail to meet the targets/agreements. Although voluntary

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			targets have not been met environmental protection has not been compromised, however, there is likely to be considerable "loss of face" for the company within the community and this is likely to be significant incentive to meet targets. Other rewards or incentives provided by DEWCP to encourage companies to perform beyond compliance and prepare EIPs could be withdrawn.
28. The need for an offence for not "taking all reasonable and practicable measures" in the context of proposed amendments to the Act and the difficulties of defining reasonable and practicable is difficult to justify. Waste minimisation can be given effect through approved policies and consultative/negotiation processes rather than through an offence provision under the Act.	**DEP** The DEP agrees with this statement.	29. DEP should encourage the voluntary preparation of EIPs but the implementation of EIPs may become a condition of the licence.	**DEP** The DEP will be able to require both the preparation and implementation of EIPs as a condition of licence once the Act amendments are passed. However, the preference is for voluntary preparation. **Chamber of Commerce & Industry** Voluntary programs should not become subject of enforceable conditions. The circumstances under which DEWCP may require the preparation and implementation of an EIP should be clearly defined.
29. The proposed amendments to the Act enable EMPs and EIPs to be required as a condition of licence.	**DEP** The DEP agrees with this statement.	30. Targets in EIPs should not be specified in licence conditions.	**DEP** For clarification, the DEP will seek legal advice on the enforceability of voluntary targets in EIPs. The DEP will treat non-compliances with voluntary targets in accordance with its enforcement policy. Targets of critical environmental significance may remain in traditional licence conditions. **Chamber of Commerce & Industry** Agreed. This should be very clearly detailed in the final report. The Chamber of Commerce & Industry agrees that targets should not be specified in licenses. Only those items against which an offense can be committed (i.e. limits) should be included. Targets and associated management responses are better placed in Environmental Improvement Plans. Inclusion of targets in a license may cause stakeholders to believe that enforcement measures should be taken when a target is exceeded.
30. The EIP/EMP process has proved very successful in Victoria as it involves a tripartite process where an agreement is achieved between the community, regulator and licensee.	**DEP** The DEP agrees with this statement. See also 26.	31. DEP should in situations where there is substantial community concern and where a licensee: • voluntarily undertakes an EIP amend the licence to ensure the EIP is implemented; or • refuses to prepare an EIP or produces an unsatisfactory EIP, may require an independent audit	**DEP** The DEP intends to include preparation and implementation of all EIPs as licence conditions and will publish guidelines on how to prepare EIPs. The Act amendments also enable the DEP to require environmental audits and the submission of audit reports. This may result in changes to licence conditions. **Chamber of Commerce & Industry** While the license may be amended requiring the

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		of environmental performance and implement the results of the audit through amendment to licence conditions.	implementation of the EIP the targets and agreements in the EIP should not become conditions in themselves or be enforceable.
31. The EIP/EMP has a role in: • demonstrating improvement in environmental performance, • comparison to industrial benchmarks; • consistency with environmental principles; • promoting engagement with the community; and • documenting improvement programs to meet new environmental standards.	**DEP** The DEP agrees with this statement. See also 26.	32. A formal policy and any necessary amendments to the Act for the enforcement of targets should be developed by DEP, in conjunction with stakeholders, which does not discourage the achievement of "progressive" targets.	**DEP** The DEP will develop a policy on enforcement of all voluntary targets, and consider the need for any Act amendments as part of the review of the Act. **Chamber of Commerce & Industry** Contradicts recommendation 30. Targets should not be license conditions and thus not enforceable as a licence condition. Other sanctions may be more appropriate.
32. Taking punitive against those persons for breaching targets that go beyond statutory compliance will discourage progressive commitment to environmental performance. The enforcement of targets is a critical issue that needs to be resolved. .	**DEP** The DEP agrees with this statement. The use of targets specifically addresses the problems caused by setting limits well below levels of environmental concern.	33. A reward system should be developed by DEP following extensive consultation with stakeholders that distinguishes between those licensees that go beyond compliance, engage the community and have an appropriate environmental management system in place.	**DEP** The DEP will review its options for rewarding good environmental performance. **Chamber of Commerce & Industry** Agreed Chamber of Minerals & Energy representative on Stakeholder Reference Group The reward system proposed in Recommendation 33 may be a useful initiative however, it is considered to be a longer term priority with more important issues to address in the short term. A reward system could be linked to the enforcement policy by allowing for good performance to be a consideration in the enforcement actions taken in the event of licence breaches.
		34. DEP should develop guidelines for the preparation of EIPs and community involvement in this process.	**DEP** See 28 and 31. **Chamber of Commerce & Industry** Agreed
Cumulative impacts			
Overall	**Eastern Metropolitan Regional Council representative on Stakeholder Reference Group** The issues identified for cumulative impacts are relevant and seek to address community concerns regarding applications/projects being assessed in "isolation" of other factors that may lead to adverse impacts (eg synergistic effects). Neighbourhood plans (that can consider sustainability) and environmental agreements between industry the regulator		

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	and key stakeholders may provide a useful vehicle to address cumulative impacts and wider social/community issues, however it may be worth undertaking trials in this regard to determine the effectiveness and acceptability of this approach, given the current political climate regarding compliance and enforcement. One of the key concerns regarding cumulative impacts relates to community health and the potential or perceived impact on health, regardless of an industry complying with its environmental conditions. This has only been lightly touched on in the review (with reference to referral to the Health Department as part of the proposed licence approval process), however further consideration needs to be given on how to deal with issues regarding industry compliance and potential or perceived health impacts. The difficulty and costs in establishing a causal link between these factors are significant and are unlikely to be avoided even with comprehensive community consultation and agreements in place. Is there a need to establish another process to manage this situation, rather that conflicts being handled on a case by case basis?		
33. In the absence of adequate policy framework cumulative emissions, trading and environmental offsets are unlikely to be adequately addressed. The current Act and proposed amendments do not enable the preparation of neighbourhood plans or agreements which may provide an appropriate licensing framework.	**DEP** The DEP acknowledges the lack of a clear policy or legislative framework for dealing with cumulative impacts, trading and environmental off-sets. However, the EPP process has been used successfully to manage SO2 emissions from multiple sources in Kwinana and Kalgoorlie, and is being developed to manage water quality in Cockburn Sound. Also, the EIA process has addressed cumulative impacts such that the DEP does not consider it has been a significant issue that has needed to be addressed through the licensing process (e.g. multiple air and wastewater discharges on the Burrup Peninsular). It is not clear whether neighbourhood agreements are an appropriate tool for managing cumulative impacts in complex environments.	35. Neighbourhood plans or environmental agreements (refer Section 7 above) should be developed through a negotiated process in areas where cumulative emissions or limited environmental capacity are an issue to provide a framework for: • establishing environmental objectives and an action plan; • determining which activities should be prescribed within the relevant area; • addressing cumulative impacts in accordance with environmental objectives; and • offsetting and trading.	**DEP** The DEP will investigate the Neighbourhood Environmental Improvement Plan (NEIP) system that operates in Victoria and look at options that could be implemented in WA (noting that EPPs may provide a more robust and comprehensive process for dealing with cumulative emissions). **Chamber of Commerce & Industry** The existing EPP process provides this framework.
34. DEP has on occasions and in the absence of approved policy arbitrarily reserved "environmental capacity" or made allowance for anticipated current ambient levels through setting lower emission limits.	**DEP** The DEP would argue that decisions to reserve environmental capacity is legitimate and consistent with minimising the likelihood of pollution, but that the reasons for these decisions could be better documented. The DEP does not consider that emitting industries have an automatic right to take up the environment's assimilative capacity.	36. Licensing should be seen as a tool to facilitate the implementation of the plan or agreement.	**DEP** Should NEIPs be adopted, the role of licenses in facilitating their adoption would also be considered in a similar way to which EPPs are currently given expression **Chamber of Commerce & Industry** Already is under Kwinana and Kalgoorlie EPPs – but it breaks down in practice if there isn't clear understanding and statement of objectives, processes and enforcement mechanisms

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35. The reservation of environmental capacity is not an environmental protection issue but is primarily an industrial development, commercial or Government policy matter. In specific areas the Government may determine rules for sharing environmental capacity. Any trades or reallocations would require the consent of the regulatory agency to ensure the environment is protected by the transaction.	**DEP** See 34, noting that the EPA/DEP has been the means of giving expression to government policy in this area.		
36. Environmental offsets are not readily achieved through the current licensing process but are important in achieving cost effective environmental outcomes within a local area.	**DEP** The DEP supports the concept of environmental off-sets (e.g. Busselton WWTP), but does need to develop a policy to clarify and encourage the use of this option and guide decision-making		
Emission limits and ambient standards			
Overall	**Contaminated Sites Alliance** A clear theme has emerged among certain stakeholders that 'alarmist community opinion' has played a significant role in setting 'onerous emission limits' in licences rather than taking a 'rational environmental risk' position. As a community activist this comes as something of a surprise. As I am in the position to have a broad range of feedback from every community group and activist working on pollution issues in this state I find it most amusing that certain stakeholders have this view. To date I have not been made aware that any action by any community groups has resulted in any change to any license that has resulted in more stringent limits (I would certainly be made aware if this was the case). The only exception may be the Brookdale Liquid Waste Treatment Plant where illegal treatment of hazardous wastes was eventually stopped (as it should be) due to community pressure. This only occurred after the DEP tried to expand the plant, move the goalposts, and turn illegal hazardous waste treatment into an expanded 'legal' hazardous waste treatment facility. Indeed the licence for the plant would have allowed for a whole range of additional hazards to be incorporated in the operation of the plant and greatly increase fugitive emissions. Indeed attempts by community groups to introduce an internationally accepted emission limit of for dioxin of ITEQ 0.1ng/Nm3, into the licence of a Kwinana waste treatment facility specifically treating dioxin contaminated waste, was repeatedly frustrated by both the DEP and the industry		**Eastern Metropolitan Regional Council representative on Stakeholder Reference Group** The recommendations are generally supported and worthy of further consideration, but will require a much more comprehensive research and review process with costs to industry and Government

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	concerned for many months. To date only the Stephenson and Ward incinerator in Welshpool has a 'goal' for dioxin emissions. No other industry has dioxin emission limits despite constant urging by the public and environment groups. The attempt to portray community opinion on emissions as 'ignorant, confused, irrational and unscientific' reads like the standard rhetoric of an industry PR machine in denial. The community is far more sophisticated in its appreciation of emission issues than many stakeholders understand. The baseless assertion that licensees suffer onerous regulation due to emotional community protests, suggests that the DEP drafts licences to suit the whim of a vocal minority (from the community – not industry). It is our experience that such claims have no basis in truth or reality and are made in an attempt to persuade policy makers that no further community input into licences should be permitted. If such claims are to continue to influence this process then some evidence or their veracity should be produced. I note with some disappointment that the term 'confused' is often used throughout the report to describe the position and comprehension of community stakeholders. The tone of this language reinforces the errant view that the community is solely acting irrationally or emotionally in relation to license issues. The recommendations of this review support the case that it is actually the DEP who have been 'confused' about the purpose and objectives of the licences they draft and (sometimes) attempt to enforce. Hence the need for reform. All comments below are numbered by section as they appear in the Welker report. **13.3** CSA believes that all licences should express emission limits as a concentration in comparable units of measurement (or with a clear conversion table). Load and probability based measures are not acceptable. **13.4** All licences should have emission limits for significant emissions. Significant emissions should be determined in tripartite consultation and progressively added to a schedule of known significant emissions (by industry category) developed by the DEP. **13.5** The NPI should serve as a screening tool for significant emissions (but should not be the only source of identifying significant emissions) by industry type and threshold levels should be established for each analyte reported to determine 'significance' or otherwise. I.e. A facility emitting 1kg of lead per annum should not attract a licence limit for such a relatively small amount. However, a facility emitting 1kg of PCDD/DF should definitely attract a licence limit (and probably be shut down!). The determination of 'significance' should consider relative toxicity, aggregate annual emission		

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	levels, sensitive receptors, body burdens of existing population (for POP's) and specific environmental contexts (air shed burden, sensitive ecological receptors etc). **13.7** Ambient standards are inappropriate for licence conditions as they are intended for analysis of aggregate multiple-source contribution to a common air shed. Stack emission limits and boundary monitoring for fugitive emissions (with appropriate criteria) are an appropriate license condition. **13.3 Significant Emissions** Further to the comments above, **13.15** "The significance of emissions can be assessed using an environmental risk assessment methodology". Firstly, what methodology is proposed (different methods produce drastically different outcomes)? Secondly, will the methodology include health risk assessment or only ecological risk assessment? (ie grass still grows well in Chernobyl). Thirdly, 'old fashioned' risk assessment as practiced in WA is likely to be inadequate for the task of identifying appropriate limits of emissions without recourse to the precautionary principle. (See more on risk assessment below) **13.16** This section suggests a limit should only be in a licence if it is environmentally acceptable. Does this mean that if a 'safe' environmental limit cannot be calculated, no limit will apply and it will be excluded from the licence – how does this benefit the environment or human health. **13.4 Emission limits and targets** **13.19** emission limits should not be based on "all reasonable and practicable measures' but on measurable license limits incorporating the latest advances in human and ecological toxicological assessment for non cancer endpoints and hormone disruption. **13.20** More detail is needed on targets and limits. If current 'limits' in licenses are converted to 'targets' I would strongly disagree with this concept. The implication is that current limits would be loosened and new limits that allow for higher emissions rates would be implemented. I do not support widening the goal posts. **13.21** The DEP's concept of negotiating targets and limits with industry in isolation is not supported. If such a scheme were to be considered acceptable it would at least include a tripartite negotiation system. **Eastern Metropolitan Regional Council representative on Stakeholder Reference Group** There is considerable discretion and variability of application		

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	in the use of emission limits as part of licence conditions, particularly where inadequate research, modelling and monitoring has been undertaken during the EIA and Works Approval process. The onus on gathering the required information is with the proponent, however the DEP needs to ensure that there are adequately experienced staff to ensure that the scope and level of information is adequate at each stage of the process. The findings of the investigation in regard to emission limits and ambient standards have identified key issues that require consideration by the DEP and will most likely lead to significant (and in many cases warranted) changes to the licencing system. I agree that targets should not be included as licence conditions, but rather as a management tool to trigger remedial actions to ensure that limits are not exceeded as part of an improvement plan.		
37. Emission limits are the most important component of a licence as they are transparent and clear as to the consent being given for emissions from prescribed premises.	**DEP** The DEP agrees with this statement. **Water Corporation** The findings and recommendations in this section suggest a process where licence conditions are developed (in a transparent way), based on the likely emissions from a particular development. This seems to presuppose that there will be no subjectivity (fitting the condition to the environmental risk and circumstance), and that similar industrial developments in similar environmental circumstances (ie all things being equal) will have the same licence conditions. This has not always been the case in the past and it is surprising that it has not been mentioned in terms of "consistency" (see also finding 51).	37. Emission limits for significant emissions should be the principle focus of licence conditions as they define what is permitted to be discharged in a transparent and clear manner.	**DEP** See Rec 38. **Chamber of Commerce & Industry** Agreed **Chamber of Minerals and Energy** CME supports the need for flexibility mechanisms to be applied to emissions limits and to this end the establishment of target or trigger levels and absolute or enforcement levels has some merit. However, it may not be appropriate for the trigger levels to be stipulated in a licence as this is likely to reduce the perceived enforceability of licence conditions (a situation that the review is in part aiming to rectify). **Contaminated Sites Alliance** R 37 supported, given the caveat on obsolete risk assessment methodology mentioned previously.
38. The Act does not provide any direct guidance on the extent to which emissions from prescribed activities may be specified by licence conditions. The intent of the Act appears not to require specification of emissions except that required by the CEO to administer the licence. Consequently, the extent of emission specification is highly discretionary and a transparent and clear process is required to determine which emission limits are placed in licence conditions.	**DEP** The DEP agrees with this statement and has developed a policy to guide the setting of emission limits	38. Significance of emissions should be determined on the basis of inherent and residual environmental risk of emissions which includes consideration of community concern.	**DEP** The DEP will review its emission limit setting policy in consultation with key stakeholders to appropriately include community concern as a factor to be considered. **Chamber of Commerce & Industry** Community concerns should be scientifically valid for consideration in license limits. Community concerns are better addressed in the EIP process. **Chamber of Minerals and Energy** When limits are established this should be done on the basis of a scientific assessment however it is recognised that in the absence of specific knowledge or information it may be appropriate to set limits in a tripartite arrangement between the regulator, industry and the community. Community involvement is more likely to result in a greater

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			overall acceptance of a facilities performance but there are concerns as to how community representation is facilitated and who most accurately represents the interests of the community. **Contaminated Sites Alliance** R38 supported, given the caveat on obsolete risk assessment methodology mentioned previously.
39. The Act provides a defence to licensees for pollution and taking reasonable and practicable measures offences. Licence conditions can be used to specify emission limits for all significant emissions under the current Act and more clearly under proposed amendments.	**DEP** The DEP agrees with this statement.	39. Emission limits should not be imposed for diffuse or fugitive sources where it is impracticable to monitor the emissions or an appropriate monitoring protocol is not available. The application of a condition that restricts the impact or sets an ambient level would be more appropriate in these situations.	**DEP** The DEP will also review conditions applied in relation to diffuse emissions and will seek legal advice on the enforceability of such conditions. **Chamber of Commerce & Industry** Agreed. Other mechanisms and technology such as vapour recovery on fuel storage tanks; or enclosing truck loading points could be incorporated into EIPs. **Contaminated Sites Alliance** R39 Only supported if exhaustive attempts are made to identify methods and technology for fugitive emission monitoring. In some cases fugitive emissions are greater than 'standard' emissions and must be considered as a part of licence conditions to which limits apply.
40. The concepts that apply to the allocation of water may be applied to the use of the environment for receipt of emissions. Only that part of the environmental resource required to support the development may be allocated. Similarly it may be argued that only those significant emissions required for the development should be specified in a licence.	**DEP** The DEP agrees with this statement.	40. The following approach should be followed for specification of emission limits for significant emissions in licence conditions: • The onus should be on applicants to define, in licence applications all significant emissions that are likely to arise from prescribed activities on the premises. • The applicant should demonstrate in the licence/works approval application that the level of environmental risk is acceptable, waste minimisation principles have been adequately addressed, any community concerns have been identified and addressed and the emissions are consistent with any approved policy. • Emission limits for significant emissions should be determined on the basis of acceptable environmental risk, emissions required for the development after considering waste minimisation and cumulative impacts as per an	**DEP** The DEP will incorporate the principles listed in its policy on setting limits, and include the need for the applicant to include community input in its assessment and licence application process. **Chamber of Commerce & Industry** Agreed, except for waste minimisation schedule – everything else is based on achieving acceptable environmental risk. Note that if emissions are consistent with any approved policy then the proposal should be acceptable without separate risk assessments (this could amount to a form of double jeopardy).

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		agreement or neighbourhood plan. • An emission limit schedule should be constructed for a licence and this schedule should define the characteristics (including location) of all significant emissions. Emission limits for fugitive or diffuse sources should not be included in the licence where they can not be accurately monitored. • The emission limit schedule should not be considered an emissions inventory.	
41. Significance of emissions will vary from place to place depending on a number of factors including the environmental risk posed by the emission and local ambient levels of contaminants.	**DEP** The DEP agrees with this statement.	41. Reductions in licensed emissions obtained through improvements over time should be surrendered or traded (if not required for future expansion) within a specified time in accordance with an approved policy or agreement.	**DEP** The DEP will incorporate this principle in its policy on setting limits. **Chamber of Commerce & Industry** Agreed. For regionally significant emissions such as SO2/Nox/VOCs the Government could consider developing the framework for an emissions trading scheme to encourage licensees to reduce emissions as far as efficient in order to sell the excess as an asset. If an overall reduction in emissions was required then the Government could buy a quantity of emission entitlements and remove them from the market. To prevent hording or market manipulation emission entitlements should be made available for sale after a specified period. The relative benefits of a national trading scheme compared to a state based scheme should be considered. **Contaminated Sites Alliance** R41 Cautiously support a trading scheme for non-toxic emissions but strongly oppose any trading system for air toxics, bioaccumulative compounds (particularly POP's) or any other emission with potential to affect human health as these need to be reduced from today's levels not maintained as a status quo between traders.
42. Emissions limits are not an emissions inventory but an inventory may be required by licence and subsequently lead to review of emission limits set by conditions.	**DEP** The DEP agrees with this statement.	42. Targets should be preferentially developed through the improvement plan process and should not be specified in licence conditions (refer Section 11).	**DEP** The DEP will develop a policy on enforcement of voluntary targets, and consider the need for any Act amendments as part of the review of the Act. **Chamber of Commerce & Industry** Agreed **Chamber of Minerals and Energy** The review proposes that the target levels be stipulated not as an enforceable license condition but as part of an

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			Environmental Improvement Plan (EIP) associated with the license. While this approach seems to be a sound method of setting limits to protect the environment and also of achieving continuous improvement in relation to emissions, CME is concerned that targets may be viewed as analogous to limits in the eyes of the community and would be expected to be adhered to. Additionally this approach is concerning if consistent improvement (promoted through the EIP) of emissions performance results in a lowering of the licence limit regardless of the scientific basis for the original limit. CME would like the distinction between targets and limits and the role of EIP's outlined more clearly in your report. **Contaminated Sites Alliance** R42 more information is required before any support can be given for this system.
43. DEP favours the setting of emission targets not as emission limits but as a trigger for a management response. A licence condition would specify the response required.	**DEP** The DEP agrees with this statement, but the licence condition may not specify all possible responses. **Contaminated Sites Alliance** F43 Some inconsistency given that 'targets' are not considered for inclusion in licenses but a license condition would specify the response for breaching a 'target'.		
44. The environment improvement plan process can be employed to determine targets (refer Section 11).	**DEP** The DEP agrees with this statement.		
Review and term of licences			
Overall	**Eastern Metropolitan Regional Council representative on Stakeholder Reference Group** I agree with the findings and recommendations related to terms of licences and the need to extend the term, whilst providing for sufficient income for adequate regulation and compliance checking.		**Eastern Metropolitan Regional Council representative on Stakeholder Reference Group** I agree with the findings and recommendations related to terms of licences and the need to extend the term, whilst providing for sufficient income for adequate regulation and compliance checking.
45. Under the current Act licences have been issued on a short-term basis principally because of the inability to charge an annual fee for a long-term licence. The proposed amendments to Act apparently remove this problem.	**DEP** The DEP agrees with this statement. **Water Corporation** It is accepted that licences can be amended by the CEO at any time (a contentious point in its own right), but a long-term licence might give unreal expectations in certain cases. Short-term licences could also be granted where there is any uncertainty as to the environmental consequences of the activities. For instance, a very conservative licence could be	43. Licences should not be issued for a short-term unless the life of the development is limited given the CEO power to amend the licence at any time.	**DEP** Once the Act amendments are passed, the DEP intendeds to implement longer-term (probably three-year) licences according to a schedule that will evenly distribute the re-issue workload over time, and such that higher risk industries are last to be given longer-term licenses. **Chamber of Commerce and Industry** Agree – licences should remain in force as long as fees are paid. Existing licenses should continue under the same

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	granted under the precautionary principal and relaxed over time after suitable research. Assuming long term licences from and administrative (fee and process) basis with the ability to review (openly and collegiately) at any time is acceptable.		terms and conditions if the regulator does not meet renewal dates. If periodical renewal of licensing is retained then the existing license should continue to remain in force after the expiry date until negotiations concerning the new license have been completed. This will prevent rushing the finalisation of conditions and remove the threat of plant shut down at license expiry. **Conservation Council of WA & Environmental Defenders Office WA** Recommendation 43 provides that, given the CEO will have the power to amend a licence at any time under proposed section 59 of the Act (as amended by the Bill), licences should no longer be issued for a short term. We agree with this, but note that simply amending the conditions of a licence may not be enough to protect the environment if a particular licensed activity becomes environmentally unacceptable. The licence may well need to be revoked or suspended for a period. We therefore submit that if short term licences are to be abolished, the CEO should be granted additional powers to revoke or suspend a licence if it becomes clear the licensed activity is or will become environmentally unacceptable. This will require legislative change, because the Bill currently proposes to give only limited power to the CEO to revoke or suspend: proposed section 59A. (Specifically, the CEO can only revoke or suspend a licence if she is satisfied that there has been a breach of conditions, if information in the application was false or misleading in a material respect, the business address of the holder is unknown or if the applicant applies to surrender the licence.) Amendments to licence conditions may well have as significant impact on the environment as the grant of the initial licence. The public should therefore have an opportunity to comment on any proposed amendments. We submit that amendments should be advertised, and members of the public should have the opportunity to comment upon them, in the same way that members of the public are invited to and can comment upon initial licence applications. **Contaminated Sites Alliance** R43 this recommendation does not suggest what is 'short term' as opposed to 'long term' or whether CEO amendment powers relate to the ability of the public to lodge appeals. Cannot support the recommendation in this form.
46. The annual renewal of licences has led to an increased workload for DEP and more opportunities for	**DEP** The DEP agrees with this statement, noting that technically it is currently an annual licence reissue, not renewal	44. Licences should be subject to review as specified in licence conditions or as the CEO may determine in	**DEP** The DEP will develop a policy position to guide decision-making about licence reviews (noting that proposed

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appeals.		response to substantial community concern or changed policy circumstances.	changes in licensing policy coming out of this review will necessitate amendments to many licences). **Chamber of Commerce & Industry** Agreed **Contaminated Sites Alliance** R44 Do not support in this form. What is 'substantial' community concern? How does 'review' relate to 'public appeal' as currently exist? Is it suggested that only the CEO will have discretion in alteration of licenses or will the public have a greater or lesser avenue for appeals than currently exists?
47. There is little justification for short-term licences where the licensee is complying with works approval and Part IV conditions and given the power of the CEO to amend the licence at any time.	**DEP** The DEP agrees with this statement.		
Enforcement			
Overall	**Eastern Metropolitan Regional Council representative on Stakeholder Reference Group** This is being considered as a separate consultancy, however the findings and recommendations identified in this review need to be incorporated.		
48. Enforcement policy is the subject of a separate review.	**DEP** The DEP agrees with this statement.	45. DEP should prepare guidelines for the drafting of legally enforceable conditions.	**DEP** The DEP will review its guidelines for drafting legally enforceable conditions in consultation with a range of stakeholders. **Chamber of Commerce & Industry** Agreed **Conservation Council of WA & Environmental Defenders Office WA** It is an offence under the Act to breach a condition of a licence, the maximum penalty for which is $125,000 with a further daily penalty of $25,000: section 58. However, difficulties arise when applying this provision, simply because many licence conditions incorporate discretion or are ambiguous and are therefore legally unenforceable. For example, conditions which require a licensee to take "reasonable and practicable" measures are unlikely to be enforceable because what is "reasonable and practicable" is a variable concept. Preambles of licences are also unenforceable. Including unenforceable measures in licences is ineffective and confusing. We therefore support recommendation 45, which provides that the DEP should prepare guidelines for the drafting of legally enforceable conditions. We further submit that, for a period, all new

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			licence conditions should be legally reviewed before the licence is issued in order to maximise the likelihood that the conditions are drafted in an enforceable way. Model licence conditions should also be prepared and legally reviewed for dissemination through the DEP. **Contaminated Sites Alliance** R45 Support
49. Guidelines are required for drafting of legally enforceable conditions.	**DEP** The DEP already has guidelines from the Crown solicitor's Office, but these need to be re-examined as part of the response to this review (note that CSO advice directly contradicts several recommendations of this review and of Dr Brian Robinson's review of the DEP's enforcement policy).	46. Consideration should be given to the development of agreements to encourage licensees to do better than statutory limits.	**DEP** The DEP plans to implement an EIP process modelled on the Victorian and South Australian models. **Chamber of Commerce & Industry** Agreed **Contaminated Sites Alliance** R46 Support
50. The approach to the enforcement of targets based on doing better than emission limits will influence the extent to which licensees will commit to environmental improvements. New legislative mechanisms (agreements) may be required to encourage licensees to innovate.	**DEP** The DEP considers that this issue can be addressed through its licensing and enforcement policies, but will consider legislative change as part of the review of the Act.		
Content of conditions			
Overall	**Eastern Metropolitan Regional Council representative on Stakeholder Reference Group** The findings and recommendations related to content of conditions are supported and are also considered in other sections.		**Eastern Metropolitan Regional Council representative on Stakeholder Reference Group** The findings and recommendations related to content of conditions are supported and are also considered in other sections.
51. All stakeholders complain about consistency in emission limits and conditions applied in licences. The types of inconsistencies vary widely. Inconsistent and arbitrary conditions are more likely to arise from the imposition of the requirement to "take all reasonable and practicable measures".	**DEP** The DEP agrees with this statement and is attempting to bring more consistency through development of a policy on setting emission limits.	47. Recommendations in section 13 should substantially address issues of inconsistency and arbitrary imposition or determination of emission limits.	**DEP** No action required (see 37 – 42 above). **Chamber of Commerce & Industry** Agreed. There is a perceived lack of objectivity and equity in setting licence limits. Limits should only be set on the basis of sound science, not on personal opinion or to appease public opinion. Emission limits should be related to environmental risk, harm and pollution, and be consistent with standards widely recognised in other jurisdictions
52. Preamble and contextual statements in licences create confusion amongst all stakeholders as to their enforceability. Throughput condition at best reflect in gross terms emissions from the premises and may be legally challengeable under the existing Act.	**DEP** The DEP uses the Preamble to provide contextual information and guidance in relation to issues not addressed in the licence conditions. The DEP will consider alternative Preamble wordings and formats or separate explanatory notes to reduce confusion. Statements about throughput are not enforceable, and are	48. Throughput should not be inserted into licence conditions but may be used to described the scale of the prescribed activity.	**DEP** Throughput conditions are being removed from all licenses except where they are a legitimate approach to controlling emissions **Chamber of Commerce & Industry** Agreed

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	used to inform licensees and the public about the level at which the activity has been assessed, and as a guide when a works approvals might be required for increased throughput.		**Water Corporation** If a licence was imposed with a condition which would protect environmental values, such as requiring the maintenance of enough water in a watercourse to maintain environmental water requirements, then perhaps there might be a case for licensing "throughput" (recommendation 48).
53. Ambient standards have a lesser role in licences than the setting of emission limits except where an emission limit cannot be specified for a significant emission.	**DEP** The DEP agrees with this statement, noting that ambient standards or limits may be used to derive emission limits.	49. Ambient standards should only be placed in licence conditions for significant emissions for which emission limits cannot be accurately specified.	**DEP** The use of ambient standards/limits will be included in the review of emission limit-setting policy. **Chamber of Commerce & Industry** Agreed
		50. Ambient monitoring should only be required for: • substances which have an ambient limit specified in a licence condition; or • a special program of investigation is required to determine environmental risk; or • cumulative emissions of concern; or • situation where environmental capacity is limited or exceeded; or • a formal emission trading or offsetting scheme is in place.	**DEP** The use of ambient monitoring generally conforms with this recommendation but the issue will also be included in the review of emission limit-setting policy. **Chamber of Commerce & Industry** Agreed
DEP capability			
Overall	**Eastern Metropolitan Regional Council representative on Stakeholder Reference Group** The additional resource requirements and capability of the DEP to adequate administer its regulatory function have been previously referred to in this response. I agree with the findings and recommendations of the review. The process and outcomes associated with implementing the recommendations regarding DEP capability should be open and transparent. This will assist in addressing the apparent lack of trust of the DEP by the community.		**Eastern Metropolitan Regional Council representative on Stakeholder Reference Group** The additional resource requirements and capability of the DEP to adequate administer its regulatory function have been previously referred to in this response. I agree with the findings and recommendations of the review. The process and outcomes associated with implementing the recommendations regarding DEP capability should be open and transparent. This will assist in addressing the apparent lack of trust of the DEP by the community.
54. The current resources available to effectively administer the licensing system and develop a policy framework are not adequate	**DEP** The DEP agrees with this statement as it relates to the current licensing system.	51. The current prescribed premises schedule should be reviewed to reduce the number of prescribed premise to those that pose substantial ongoing environmental risk and determine where other mechanisms under the Act should be used to protect the environment.	**DEP** The DEP will conduct a review of the prescribed premises schedule in consultation with key stakeholders and seek to use alternate regulatory approaches to licensing where this is appropriate. **Chamber of Commerce & Industry** Agree – Consideration could be given to a system [with appeals] where CEO could agree that a particular operation

Draft Issue/Finding	Comment	Draft Recommendation	Comment
			does not pose significant risk and is not subject to licence but is required to be registered.
55. The development of an appropriate policy framework will enable more consistent decisions to be made by officers.	**DEP** The DEP agrees with this statement.	52. A comprehensive training program should be developed for DEP officers that involves exchange schemes with industry and consultancies and enhanced competency in community consultation and negotiated outcomes with a view to achieving a prescribed level of competency.	**DEP** The DEP will develop a structured competency-based training program for licensing officers and will explore opportunities for other options including exchange schemes **Chamber of Commerce & Industry** Agreed. DEWCP also needs to develop a strategy to retain trained and experienced staff.
56. A comprehensive training program to enhance the capability of DEP officers has yet to be developed	**DEP** The DEP agrees with this statement.		
57. The move to long term or perpetual licences will reduce the licensing workload.	**DEP** The DEP agrees with this statement.		
Environmental risk			
58. Environmental risk assessment methodology provides a rational, clear and transparent process for the assessment of environmental significance of emissions and activities. This approach can incorporate community concern and has been applied in a "tripartite" process for agreed environmental targets in Victoria.	**DEP** The DEP agrees with this statement and will initially seek to apply the methodology described in the review in its review of prescribed premises categories. **Eastern Metropolitan Regional Council representative on Stakeholder Reference Group** I support the findings and recommendations in the use of environmental risk assessments as a key tool in the licensing and performance management process.	53. The environmental risk assessment process should be central to the assessment of emissions and the development of environmental improvement targets.	**DEP** The DEP will include considerations of technical and perceived risk assessment in its review of licence limit-setting policy and in supporting documentation for development of improvement targets **Chamber of Commerce & Industry** Strongly agree that emission limits should be based on risk. Improvement targets are likely to be more associated with waste minimisation, corporate social responsibility and community concern. **Eastern Metropolitan Regional Council representative on Stakeholder Reference Group** I support the findings and recommendations in the use of environmental risk assessments as a key tool in the licensing and performance management process.